Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

ALICE H. MORGAN, Trustee of the Morgan Family Trust Under Agreement Dated September 20, 1990, As Amended,
Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an action for damages brought by a retired couple as trustees of their family trust. After a loan broker arranged a transaction in which they lent $300,000 in return for a promissory note, the repayment of which was secured by a mortgage on real property owned by the borrower, their insurance carrier breached its express obligation under a lenders' title insurance policy to defend a challenge by the borrower's successor-in-interest to the validity of the mortgage.

The Court of Appeals' first panel decision reversed the District Court's summary judgment of dismissal and established that the lenders' title insurance policy had indeed required the carrier to defend the successor-in-interest's challenge. On remand, the District Court granted an FRCP 52(c) motion for judgment made by the carrier once the couple had closed their plaintiffs' case, ultimately awarding them only $1.00 of nominal damages.

The following questions are presented by the Memorandum and Order of a second panel of the Court of Appeals, insofar as it affirms the District Court's rejection of (a) the entirety of the couple's claim against the carrier for their attorneys' fees and costs of approximately $200,000 incurred in defending the mortgage and mitigating their damages from the carrier's failure to defend, and (b) the entirety of the couple's claim against the carrier for the lost value of a $295,877.20 deficiency claim against the borrower's successor-in-interest, who had promised to pay them amounts owed to them under the promissory note. The couple had surrendered the claim in order to settle the state court action:

1. Whether the Court of Appeals erred – in conflict with this Court – by failing to follow the Hawaii rule that an insurance carrier in breach of a policy duty to defend is "collaterally estopped from re-litigating material factual findings actually or implicitly adjudicated in the underlying suit" even though the carrier was not a party thereto, *Sentinel Insurance Co. v. First Insurance Co. of Hawaii*, 76 Haw. 277, 296, 875 P.2d 894, 913 (1994)("*Sentinel*").

2. Whether, when a federal district court holds in denying summary judgment that the defense has the burden of proof on a particular question, and then changes its mind and holds that the plaintiffs have that burden after they have rested their case at trial, the district court should allow the plaintiffs to reopen their case in order to present such proof.

3. Whether a federal court of appeals should either remand to the district trial court for the entry of meaningful findings of fact and conclusions of law, or at least enter its own meaningful findings and conclusions which can then be subject to an informed FRAP 40(a) motion for panel rehearing, where a district trial court overlooks and makes no findings which weigh and consider extensive evidence presented at trial in support of a substantial claim ($295,877.20) – here that evidence included the entire record of an underlying state court action from 1993 through 1998 – and where the court of appeals rejects the district court's only ground for denying that claim.

THE PARTIES BELOW

The parties below were Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under Agreement dated September 20, 1990, as amended, plaintiffs and appellants, and Chicago Title Insurance Company, defendant and appellee. Mr. Morgan is now deceased.

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PETITION FOR WRIT OF CERTIORARI

Alice H. Morgan, Trustee of the Morgan Family Trust Under Agreement dated September 20, 1990, as amended, respectfully petitions for a writ of certiorari to review the Memorandum and Order of the U. S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The first Court of Appeals decision in this action is set forth at 65 Fed. Appx. 184. No other matters in this action are reported.

The Court of Appeals' subject Memorandum and Order is set forth in the Appendix at pp. A-1 through A-5. The underlying District Court findings, conclusions, and orders reviewed by the Court of Appeals are at pp. A-19 through A-25, A-26 through A-32, and A-33 through A-40.

JURISDICTION

The Court of Appeals' Memorandum and Order was filed on April 6, 2007. Rehearing was partially denied on April 30, 2007, and fully denied on June 4, 2007. This Court has jurisdiction conferred by 28 USC § 1254(1) to review the Memorandum and Order by writ of certiorari.

PROVISIONS INVOLVED

28 USC § 1738, which provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Article IV, Section 1 of the United States Constitution, which provides:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

> And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Rule 52(a) of the Federal Rules of Civil Procedure which provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under

> Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule."

Rule 52(c) of the Federal Rules of Civil Procedure which provides:

> "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

STATEMENT OF THE CASE

Under Hawaii law, once an insurance carrier breaches its policy duty to defend its insured from adverse claims, the carrier is thereafter "collaterally estopped from re-litigating material factual findings actually or implicitly adjudicated in the underlying suit," even though the carrier was not a party thereto. *Sentinel, supra,* 76 Haw. at 296, 875 P.2d at 913.

Moreover, once the duty to defend has been breached, the carrier's policyholder is "entitled to negotiate a reasonable and good faith settlement of the underlying claim which amount may then be utilized as

presumptive evidence of the breaching insurer's liability" to the policyholder for indemnification, the carrier's breach having "waive[d] its right to approve of any settlement" as well as its right to require that liability be established by a litigated judgment. *Id.*

In this case, a loan broker arranged a transaction in which Petitioner Morgan and her late husband lent $300,000 in return for a promissory note, the repayment of which was secured by a mortgage on real property owned by the borrower, one Edgar D. Kerr, Jr., and protected by a lenders' title insurance policy issued by Respondent Chicago Title Insurance Company ("Chicago Title") which insured the validity of the mortgage. Appx., A-7 - A-8, A-42 - A-43.

After Kerr defaulted, the Morgans sued Kerr and his successor-owner of the mortgaged property, one Rosetta Ann Dimiceli, in Hawaii state court, seeking to foreclose their mortgage and collect the amounts owed to them under their note. Appx., A-9, A-41 - A-44. Although Dimiceli had expressly agreed that her ownership would be subject to the Morgans' mortgage, and had even agreed to pay amounts she otherwise would have owed Kerr directly to the Morgans to help retire the mortgage, Dimiceli nonetheless challenged the validity of the Morgans' mortgage in the state court collection action. Appx., A-11, A-43 - A-44, A-62 - A-65.

During more than five years of state court litigation, the Morgans successfully obtained a judgment foreclosing their mortgage, recovered $267,141.97 from the foreclosure sale, and obtained a judgment against Kerr and others for the $295,877.20 deficiency still owed under the note after receipt of the sale proceeds. Appx., A-41 - A-49, A-51, A-61.

The state court *rejected* Dimiceli's attack upon that mortgage's validity "because this Court ...found the Satisfaction Deed which she signed meant that her agreement with Kerr was to buy the property subject to Plaintiff's mortgage," although the District Court herein would later characterize Dimiceli's admission that she held title under that deed as somehow constituting a "claim" adverse to that mortgage. Appx., A-55 and A-11.

In computing the deficiency owed by Kerr and others, the state court determined that the Morgans were entitled to recover not less than $131,931.30 of their attorneys' fees incurred in the state court action, and $10,696.93 of their costs, based upon the evidence the Morgans submitted to it. Appx., A-51 (amount of the deficiency judgment, including a per diem fee award in addition to the $295,877.20), A-60 - A-61 (the calculations adopted by the state court).

The deficiency judgment against Kerr and others, filed June 26, 1998, included an express award of "attorneys' fees of $28.37 per day from and after July 2, 1996 until the day this judgment is entered." Appx., A-51.

The state court did *not* enter a comparable deficiency judgment against Dimiceli. Appx., A-51. The state court initially determined that Morgans were third-party creditor beneficiaries of Dimiceli's promise to directly pay them the amounts she otherwise would have owed Kerr for her purchase of the mortgaged property. Appx., A-46, para. 18. However, it later changed its mind, refusing to enter a deficiency judgment against Dimiceli on the basis that she had not "assumed the mortgage." Appx., A-55.

After Dimiceli appealed from all of the state court's foreclosure-related judgments, and the Morgans appealed from the denial of a deficiency judgment against Dimiceli, they settled the state court action. See Appx., A-2 - A-3. They agreed to drop their respective appeals, and Morgans agreed to surrender a $30,096.64 judgment entered against Dimiceli because of her failure to deposit certain amounts with the state court clerk. See Appx., A-2, A-3, A-51, A-55.

Because Chicago Title failed to defend them against against Dimiceli's attack on their mortgage, the Morgans were forced to litigate the state court action entirely on their own. See Appx., A-9 - A-10.

After settling with Dimiceli, the Morgans, Texas citizens, filed this diversity action under 28 U.S.C. § 1332(a)(1) against Chicago Title, an Illinois and Missouri citizen, to recover *inter alia*, under Hawaii law as set forth in *Sentinel*, *supra*, (1) the $131,931.30 of attorneys' fees and $10,696.93 of costs which the state court had found they were entitled to, plus additional fees and costs they had incurred in the state court action; (2) $295,877.20 (plus interest) – the amount the state court had awarded them in their deficiency judgment against Kerr – representing the value of the deficiency claim against Dimiceli which they had surrendered in settling with her; and (3) $30,096.64 (plus interest), representing the value of the judgment against Dimiceli which they had surrendered in settlement. See Appx., A-2 - A-3, A-21.

The District Court initially dismissed this action on the ground that Chicago Title did not have a duty to defend. Appx., A-11. But the Court of Appeals reversed, holding that none of the exceptions to coverage

in Chicago Title's policy language applied. Appx., A-11 - A-12.

On remand, Chicago Title sought partial summary judgment on Morgans' claim for their state court attorneys' fees and costs, contending that Morgans had a burden of allocating them among allegedly covered and uncovered activity. Appx., A-12 - A-14. The District Court denied that request, holding that because of its breach of its duty to defend, it was Chicago Title – and not the Morgans – which had the "heavy" burden of proving that any of Morgans' state court fees and costs should be allocated to uncovered activity. *Id.* "If, at a later time, Defendant can carry its heavy burden and demonstrate allocability, the court will allocate expenses." Appx., A-14.

This action then proceeded to trial. Because of the nature of the case, the Morgans' evidence consisted almost entirely of documents, including the entire record of the state collection action.[1] See Appx., A-22

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[1] One common way of determining the value of a claim on appeal, like the one the Morgans surrendered in their settlement with Dimiceli, is to determine whether the appeal "should" have been successful based upon a review of the record in the trial court. *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600, 603-604 (Wash. 1985). Use of a "should" or "reasonable appellate court" standard eliminates speculation over individualized factors. *See Mattco Forge, Inc. v Arthur Young & Co.*, 52 Cal. App.4th 820, 840, 60 Cal.Rptr.2d 780, 793 (1997).

(incomplete statement of the documents admitted into evidence).

At the close of Morgans' case, the District Court stopped the trial and dismissed their claims under FRCP Rule 52(c), subsequently entering judgment for Chicago Title. See Appx., A-19, A-24.

Rejecting in its entirety Morgans' claim for their state court fees of over $131,190.30 and costs of $10,696.93, the District Court's minimal findings and conclusions simply ignored the collateral estoppel effect of Chicago Title's breach of its duty to defend and the state court's prior judgments, ignoring *Sentinel Insurance Co. v. First Insurance Co. of Hawaii*, 76 Haw. 277, 296, 875 P.2d 894, 913 (1994). Appx., A-19 - A-25. The District Court held that the Morgans had the burden of proving both the reasonableness and efficacy of the work performed on their behalf,[2] and *sub silento* that those questions should be relitigated in this action – without even mentioning *Sentinel*, or the state court's judgments, or the evidence Morgans had submitted to the state court

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[2] The District Court's holding was partially based upon a misreading of *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal.4th 38, 64, 948 P.2d 909, 925 (Cal. 1997), which actually holds that it is insurance carriers in breach of their duty to defend which have "the burden of proof" that their policyholder's fees and costs "are in fact . . . unnecessary." See Appx., A-24.

to obtain them. *Id.* It then held that Morgans' evidence of reasonableness and efficacy was insufficient. Appx., A-24.

In rejecting the fee and cost claim, the District Court also ignored its own prior ruling that Chicago Title – and not the Morgans – would have the burden of proof at trial on the question of whether fees and costs should be allocated to uncovered activity. Appx., A-12 - A-14, A-24. Instead it held – based upon a misreading of California law[3] – "that the insured must also prove that the fees and costs are connected to covered claims," even if the duty to defend has been breached. Appx., A-24.

Taken by surprise by the District Court's change of mind, the Morgans moved for leave to reopen their case, so they could present evidence on allocability to meet their newly-imposed burden, and made an offer of proof, but their motion was denied and their offer of proof rejected. Appx., A-16 - A-18.

The District Court gave even shorter shrift to Morgans' $295,877.20 and $30,096.64 claims for the value of the consideration they surrendered in settling with Dimiceli. Instead of rendering genuine findings and conclusions evaluating them, it simply held that "the Plaintiffs did not produce any evidence on the remaining consequential damage claims." Appx., A-22.

In so holding, the District Court again ignored the collateral estoppel rule established by *Sentinel,* and failed

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[3] California law is exactly the opposite. *See,* e.g., *The Upper Deck Co., LLC v. Federal Insurance Co.,* 358 F.3d 608, 612 (CA 9, 2004); *Buss v. Superior Court,* 47 Cal.App.4th 679, 50 Cal.Rptr. 447, 456-457 (Cal.App. 1996), *aff'd,* 16 Cal.4th 38, 939 P.2d 766 (Cal. 1997).

to recognize and evaluate such evidence from the duly-admitted state court record as the surrendered $30,096.64 judgment itself, the $295,877.20 deficiency judgment entered against Kerr and others by the state court, the underlying documents upon which the state court based its $295,877.20 judgment, and the written agreement in which Dimiceli agreed to pay the Morgans the amounts she owed to Kerr. See Appx., A-47, A-51, A-59 - A-65.

On Rule 59(e) reconsideration, the District Court vacated its dismissal order and entered a $1.00 judgment for nominal damages in Morgans' favor, but otherwise left its rejection of Morgans' damage claims intact. Appx., A-30. It added a new reason for rejecting Morgans' claims for the value of the consideration they surrendered in settlement, which the Court of Appeals later rejected, *i.e.*, that the consideration the Morgans surrendered in settlement was choses in action and not money. Appx., A-2, A-31.

The Court of Appeals' Memorandum and Order reversed the District Court's rejection of Morgans' claim on the $30,096.64 judgment they surrendered in settling with Dimiceli, recognizing that "The surrender of a judgment may constitute consideration recoverable as compensatory damages." Appx., A-2.

However, without mentioning the Hawaii collateral estoppel rule set forth in *Sentinel*, the Court of Appeals affirmed the District Court's rejection of Morgans' claims for (1) their fees of $131,190.30 and costs of $10,696.93 which the state court had found appropriate under Hawaii law, plus additional fees and costs, and (2) the value of their $295,877.20 deficiency claim against

Dimiceli which they surrendered in settling with her. Appx., A-2 - A-3.

In so holding, the Court of Appeals merely said, in toto (Appx., A-2 - A-3):

> "The district court did not err in dismissing the Morgans' claims for other damages. At trial, the Morgans failed to prove the attorneys' fees they sought were necessary and reasonably related to the defense of the covered claims, as required by Hawai'i law. See Keller v. La Rissa, Inc., 586 P.2d 1017, 1021 (Haw. 1978); Sharp v. Hui Wahine, Inc., 413 P.2d 242, 245–46 (Haw. 1966). Additionally, the Morgans failed to prove with "reasonable certainty," see Ferreira v. Honolulu Star-Bulletin, Ltd., 356 P.2d 651, 656 (Haw. 1960), the value of their surrender of a claim which had previously been dismissed by the state court. The district court's conclusion that the Morgans failed to prove these damages was not contrary to its prior order, which related only to the burden of proving allocability of defense costs."

The Court of Appeals certainly was conscious of Sentinel, inasmuch as it cited another aspect of Sentinel in reversing the District Court's dismissal of Morgans' claim on the $30,096.64 judgment claim. See Appx., A-2. But its cryptic Memorandum and Order offers no explanation whatsoever of why it failed to apply the collateral estoppel aspect of Sentinel to Morgans' claims for their state court fees and the value of their deficiency claim against Dimiceli.

Moreover, because the Court of Appeals offered no explanation whatsoever for its statement that Morgans somehow "failed to prove with reasonable certainty"[4] the value of their $295,877.20 deficiency claim, and the District Court had merely held – ignoring *Sentinel* and the state court record – that no evidence whatsoever had been offered to support that claim (and therefore entered no genuine findings or conclusions evaluating the actual evidence), Petitioner Morgan has no clue as to why her seemingly-meritorious deficiency-based claim, which now exceeds $500,000 because of interest accruing on the $295,877.20 since 1998, has been rejected.

REASONS FOR GRANTING THE WRIT

The Court of Appeals failed to follow decisions of this Court, and failed to require the District Court to follow them, by failing to follow and to require that the District Court follow the Hawaii rule that an insurance carrier in breach of its duty to defend is "collaterally estopped from re-litigating material factual findings actually or implicitly adjudicated in the underlying suit." Sentinel, supra. The Court of Appeals did so by effectively resolving an important federal issue – the

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[4] Under Hawaii contract and tort law, "The uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount." "When the fact of damage is established, Hawaii law will not insist upon a higher degree of certainty as to the amount of damages than the nature of the case admits, particularly where the uncertainty was caused by the defendant's own wrongful conduct." "Damages which cannot accurately be measured should not for that reason be denied, but the amount should be left to the jury." *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 355, 366, 376 (CA 9, 2005).

preclusive effect a federal district court sitting in diversity should give to a state court's determinations – contrary to the decisions of this Court. The Court of Appeals has allowed the District Court to so far depart from the accepted and usual course of judicial proceedings in instances where state courts have made preclusive determinations as to call for an exercise of this Court's supervisory powers.

By allowing the District Court to revisit its order on partial summary judgment – where it held that insurance carriers in breach of their duty to defend have the burden of proving that state court fees and costs incurred by their policyholders are allocable to uncovered activity – and to instead hold that policyholders have the burden of proving non-allocability of their fees and costs to uncovered claims after the Morgans had rested their plaintiffs' case and without allowing the Morgans to re-open it to meet that burden, the Court of Appeals again allowed the District Court to depart from the accepted and usual course of proceedings – in a manner contrary to the decisions of other Courts of Appeals on an important question of federal procedure likewise calling for an exercise of the Court's supervisory powers.

The Court of Appeals, by itself disposing of the Morgans' $295,877.20 claim for the value of their surrendered deficiency claim against Dimiceli with nothing more than a cryptic comment that they had somehow in some unspecified manner "failed" to prove its value, after the District Court dismissed that claim without rendering any meaningful findings and conclusions – stating only, erroneously, that the Morgans had failed to present any evidence whatsoever to support it – the Court of Appeals further deviated from acceptable and usual courses of proceeding, and allowed the District

Court to depart from acceptable and usual proceedings, in a manner calling for an exercise of this Court's supervisory powers.

This Court should therefore grant certiorari. It should then remand to the Court of Appeals with instructions to further remand to the District Court for reconsideration of Morgans' rejected claims in light of Sentinel's collateral estoppel rule and other applicable law. Mrs. Morgan should be allowed an opportunity to prove non-allocability, if that remains an issue, and the District Court should be required to enter meaningful findings and conclusions, sufficient to enable Mrs. Morgan to know why her claims are being resolved as they are, and to enable her counsel to specifically address the specific points the District Court is concerned with.

I. THE COURT OF APPEALS FAILED TO FOLLOW, AND ALLOWED THE DISTRICT COURT TO DEPART FROM, THIS COURT'S HOLDINGS ON THE PRECLUSIVE EFFECT OF STATE COURT DETERMINATIONS IN FEDERAL DIVERSITY ACTIONS.

The Court of Appeals failed to follow this Court's holding in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 80-85, 102 S.Ct. 892, 896-898, 79 L.Ed.2d. 56, 61-64 (1984), and its progeny, when it failed to follow or even acknowledge the Hawaii rule that an insurance carrier in breach of its duty to defend is "collaterally estopped from re-litigating material factual findings actually or implicitly adjudicated in the underlying suit," *Sentinel, supra*, 76 Haw. at 296, 875 P.2d at 913, and by failing to require that the District Court follow the Hawaii rule.

Migra settled the question of whether a federal district court sitting in diversity must give a state court's determinations the same issue and claim preclusive effects they would be given under the law of the state in which the determinations were entered. *Migra, supra.* It must. *Id.*

In this case, the state court's deficiency judgment against Kerr and others explicitly and implicitly determined that Morgans incurred reasonable and efficacious fees of not less than $131,931.30 in the state court action, and $10,696.93 of their costs, based upon the evidence the Morgans submitted to it. Appx., A-51 (amount of the deficiency judgment, including a per diem fee award in addition to the $295,877.20), A-60 - A-61 (the calculations adopted by the state court).

Further, the state court's $295,877.20 deficiency judgment against Kerr, and others, establishes that the deficiency still owed to the Morgans after the foreclosure sale was exactly that – $295,877.20 – eliminating any need for determining the amount of the deficiency, as of the date that judgment was entered, for purposes of determining the value of the Morgans' surrendered deficiency claim against Dimiceli.

Under *Migra* and *Sentinel*, Chicago Title is estopped from, and cannot dispute, those amounts.

II. THE COURT OF APPEALS ALLOWED THE DISTRICT COURT TO DEPART FROM THE ACCEPTED AND USUAL COURSE OF TRIAL PROCEEDINGS, IN A WAY CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEALS, BY ALLOWING THE DISTRICT COURT TO IMPOSE A NEW BURDEN OF PROOF UPON THE MORGANS CONTRARY TO THE THEN-ESTABLISHED LAW OF THEIR CASE AFTER THEY HAD CLOSED THEIR PLAINTIFFS' CASE AT TRIAL, WITHOUT ALLOWING THEM TO RE-OPEN THEIR CASE TO MEET THE NEWLY-IMPOSED BURDEN.

Mrs. Morgan does not dispute that the law of the case doctrine allows federal district courts to depart from their prior rulings under appropriate circumstances.

However, as the Second Circuit stated in *Prisco v. A. A. Carting Corp.*, 168 F.3d 593, 607 (CA 2, 1999), a principal concern of that doctrine is that a district court's disregard of one of its earlier rulings not be allowed to prejudice anyone, and a court's "revisiting without notice" an issue "which ultimately turned on the sufficiency of a party's evidence" after that party has put on its case "raises the specter of severe prejudice" if it deprives a party "of the opportunity to prepare and present evidence on that issue at trial."

See also *White v. Godinez*, 301 F.3d 796, 803 (7th Cir. 2002)(under the law of the case doctrine, we do not reopen issues decided in earlier stages of the same litigation unless ... the party that benefited from the earlier ruling would not be unduly harmed").

Exactly that happened in this case, and is likely to happen whenever a federal district court changes a prior ruling and shifts a burden of proof to a party – plaintiff or defendant – which has already rested its case-in-chief at trial.

In this particular case, the Court of Appeals chose not to rule on the propriety of the District Court's change of mind. Appx, A-3. Having rejected the Morgans' claim for their state court fees and costs on another ground – a supposed lack of evidence on the questions of reasonableness and efficacy of any of the legal work performed on their behalf – the District Court awarded them absolutely nothing for the more than five years of work performed on their behalf in the state court, even though the Morgans had ultimately defeated Dimiceli's challenge to their insured mortgage in that court.

However, the District Court's ruling on reasonableness and efficacy should be reversed, because it ignores, inter alia, the collateral estoppel effect under Sentinel of the state court's determinations that $131,931.30 of the Morgans' fees and $10,696.93 of their costs are recoverable under Hawaii law. See Part I above.

Accordingly, the propriety of the District Court's change of mind, and its refusal to reopen to allow the Morgans to present additional evidence after it changed its mind, are live issues.

III. THE COURT OF APPEALS DEPARTED FROM ACCEPTABLE MEANS OF PROCEDURE BY CRYPTICALLY DISPOSING OF A SUBSTANTIAL CLAIM ($295,877.20) WITHOUT MEANINGFUL EXPLANATION, WHERE THE DISTRICT COURT HAD NOT ENTERED FINDINGS AND CONCLUSIONS CONSIDERING THE EVIDENCE SUBMITTED IN SUPPORT OF THAT CLAIM EITHER, SO THERE HAS NEVER BEEN A MEANINGFUL EXPLANATION OF WHY THAT CLAIM HAS THUS FAR BEEN REJECTED.

Rule 52 of the Federal Rules of Civil Procedure requires federal district courts to enter findings and conclusions when they short-cut trials and enter judgments under Rule 52(c).

Proper findings and conclusions serve many important purposes. They advise concerned persons of why a case was resolved in a particular way – for example, the elements a plaintiff was required to prove, and specifically why the court believes those elements were not proven. They thereby provide parties with an opportunity, not only to know what happened to them, but also to address the specific deficiencies the district court found in their case – so that they can point out any deficiencies in the court's analysis in appropriate motions.

The thought process a district court should go through in preparing findings and conclusions is an important check against error as well. Especially in cases with complex or voluminous records, they enable a court to contemplate the applicable facts and law, and think through whether the court's initial impressions are or are not supported by the facts and law.

In this particular case, the District Court avoided addressing the evidence submitted in support of the Morgans' claim for the value of their surrendered claim against Dimiceli by holding that no evidence whatsoever had been submitted to support it, ignoring, *inter alia*, the entire state court record which had been submitted to allow an appeal-within-a-trial evaluation. See note 1 above.

We already know that the District Court, and the Court of Appeals, failed to recognize any of the facts established under the collateral estoppel rule set forth in *Sentinel, supra*.

By cryptically affirming, stating that the Morgans had somehow failed to meet their burden of proof, but without saying why, the Court of Appeals compounded the problem. That precluded a meaningful motion for reconsideration at the appellate level, because the Morgans had no idea of what the purported deficiencies in their proof supposedly were.

See also *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (CA 10), stating that proper judicial administration generally favors a remand to the district court for initial examination, where an issue has been raised in but not ruled upon by a district court.

CONCLUSION

A writ of certiorari should be granted for each and all of the foregoing reasons.

Respectfully submitted,

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APPENDIX

A-1

FILED
APR 06 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT R. MORGAN; et al., Plaintiffs - Appellants,

v.

CHICAGO TITLE INSURANCE COMPANY, Defendant - Appellee.

ALBERT R. MORGAN; et al., Plaintiffs - Appellants,

v.

CHICAGO TITLE INSURANCE COMPANY, Defendant - Appellee.

ALBERT R. MORGAN; et al., Plaintiffs - Appellants,

v.

CHICAGO TITLE INSURANCE COMPANY, Defendant - Appellee.

No. 05-17145
D.C. No. CV-00-00145-BMK
No. 06-16175
D.C. No. CV-00-00145-DAE/BMK

No. 06-16292
D.C. No. CV-00-00145-BMK

Appeal from the United States District Court
for the District of Hawai'i
Barry M. Kurren, Magistrate Judge, Presiding
Argued and Submitted March 6, 2007
Pasadena, California

MEMORANDUM AND ORDER*

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: FERNANDEZ, GRABER, and IKUTA, Circuit Judges.

The surrender of a judgment may constitute consideration recoverable as compensatory damages. See Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 913 (Haw. 1994); Earth Elements, Inc. v. Nat'l Am. Ins. Co. of Cal., 48 Cal. Rptr. 2d 399, 402 (Ct. App. 1996). Therefore, the district court erred in dismissing the Morgans' claim that they are entitled to reimbursement for the $30,096.64 judgment they surrendered to Dimiceli as part of their settlement of Dimiceli's claims. On remand, the court must consider whether the Morgans established that this element of their settlement with Dimiceli was reasonable and in good faith, such that it "may then be utilized as presumptive evidence of the breaching insurer's liability." Sentinel, 875 P.2d at 913.

The district court did not err in dismissing the Morgans' claims for other damages. At trial, the Morgans failed to prove the attorneys' fees they sought were necessary and reasonably related to the defense of the

covered claims, as required by Hawai'i law. See Keller v. La Rissa, Inc., 586 P.2d 1017, 1021 (Haw. 1978); Sharp v. Hui Wahine, Inc., 413 P.2d 242, 245–46 (Haw. 1966). Additionally, the Morgans failed to prove with "reasonable certainty," see Ferreira v. Honolulu Star-Bulletin, Ltd., 356 P.2d 651, 656 (Haw. 1960), the value of their surrender of a claim which had previously been dismissed by the state court. The district court's conclusion that the Morgans failed to prove these damages was not contrary to its prior order, which related only to the burden of proving allocability of defense costs.

The parties have not cited any Hawai'i decision directly ruling whether plaintiffs can recover losses due to tax consequences caused by a breach of contract. However, Hawai'i courts generally allow plaintiffs to recover any loss that can be shown with reasonable certainty, and have rejected a per se rule that certain types of losses are too speculative as a matter of law. See Chung v. Kaonohi Ctr. Co., 618 P.2d 283, 290-291 (Haw. 1980), abrogated on other grounds by Francis v. Lee Enters., Inc., 971 P.2d 707 (Haw. 1999); see also Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 366 (9th Cir. 2005). Therefore, the district court erred in refusing to allow the Morgans to introduce evidence of tax consequences caused by Chicago Title's breach of insurance contract. On remand, if the district court concludes that the Morgans are entitled to greater than nominal damages, it must also determine whether under the law of Hawai'i and the facts of this case, the Morgans are entitled to recover tax losses caused by Chicago Title's breach of contract. If the district court determines again that the damages are nominal, it need not revisit this issue because any error would be harmless.

For their bad faith claim, the Morgans sought only punitive damages and the same consequential damages available in their breach of contract claim. Therefore, once the district court dismissed the punitive damages claim, any error in dismissing the bad faith claim was harmless.

Because Chicago Title sought summary judgment on the bad faith claim without referencing its privileged communications, the district court did not err in refusing to compel discovery of such communications. See Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162–63 (9th Cir. 1992).

The Morgans were not entitled to interest on the costs awarded to them by the Ninth Circuit because they failed to provide any supporting authority per Local Rule 54.2(c) of the Hawai'i District court. Because the Morgans failed to show that the transcripts used on appeal were "necessarily obtained for use in the case" as required by 28 U.S.C. § 1920(2), they were not entitled to their costs for such transcripts.

On remand, the court should consider Morgans' entitlement to attorneys' fees under Haw. Rev. Stat.§ 607-14 (2006) and Haw. Rev. Stat. § 431:10-242 (2006).

In the absence of allegations of bias or unusual circumstances, we deny the request to remand to a different judge. See Living Designs, 431 F.3d at 372–73.

Because the Morgans' pending motion to correct and provide record cites constitutes an improper supplement to its opening brief, it is denied. Cf. Fed. R. App. P. 28(j).

The parties shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OCT 15 2004
At 8 o'clock and 30 min. a.m.
WALTER A.Y.H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as Amended, Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY, Defendant.

CIVIL NO. 00-00145 BMK
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING (1) PLAINTIFFS' SECOND CAUSE OF ACTION FOR BAD FAITH; AND (2) A DETERMINATION THAT CHICAGO TITLE IS RESPONSIBLE FOR FEES AND COSTS RELATED TO THE DEFENSE OF ONLY THE DROA CLAIM

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING (1) PLAINTIFFS' SECOND CAUSE OF ACTION FOR BAD FAITH; AND (2) A DETERMINATION THAT CHICAGO TITLE IS RESPONSIBLE FOR FEES AND COSTS RELATED TO THE DEFENSE OF ONLY THE DROA CLAIM

Before the Court is Defendant Chicago Title Insurance Company's ("Defendant") Motion for Partial Summary Judgment Regarding (1) Plaintiffs' Second Cause of Action for Bad Faith; and (2) a Determination that Chicago Title is Responsible for Fees and Costs Related to Defense of Only the DROA Claim ("Motion for Partial Summary Judgment"). After careful consideration of the motion and supporting and opposing memoranda, the court hereby GRANTS IN PART and DENIES IN PART the Motion for Partial Summary Judgment.

I. BACKGROUND

A. THE UNDERLYING LAWSUIT.

This lawsuit arises out of a foreclosure action filed by Plaintiffs Albert R. Morgan, Jr., and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as Amended ("Plaintiffs") in the Fifth Circuit Court, State of Hawaii ("Foreclosure").

Edgar K. Kerr ("Kerr") was owner of a fee simple estate in Lot 22 of the Princeville at Hanalei in Hanalei, Kauai, Hawaii, File Plain No. 1557 (the "Property").

In 1989, Kerr and Rosetta Ann Dimiceli ("Dimiceli") executed a Document Receipt, Offer and Acceptance ("DROA") for the sale of the Property to Dimiceli. The DROA was never recorded.

On or about December 30, 1991, Plaintiffs loaned $300,000 to Kerr and took a mortgage on the Property as security. Plaintiffs obtained a Loan Policy of Title Insurance (the "Policy") from Defendant.

The Policy, dated January 10, 1992, insured the priority of Plaintiffs' mortgage on the Property. The Policy insured against, among other things, title being vested in other than the named vestee, any defect in title, or lack of priority of the insured mortgage.

The Policy also contained the following exclusions and exception from coverage:

> EXCLUSIONS FROM COVERAGE
> The following matters are expressly excluded from coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of: * * *
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material) . . . .

Section 4(a) of the Conditions and Stipulations of the Policy provided as follows:

> Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation which any third party asserts a claim adverse to

> the title or interest as insured, but only as to those stated causes of action alleging a defect, lien, or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

On May 9, 1992, Kerr and Dimiceli entered into an Agreement of Sale ("AOS"), and on November 2, 1992, executed a Satisfaction Deed ("SOD"). Both instruments were recorded.

Thereafter Kerr defaulted on Plaintiffs' loan. Plaintiffs filed the Foreclosure Action against him and others, including Dimiceli. In 1994, Plaintiffs' motion for summary judgment was denied and the case proceeded to trial.

B. THE INSTANT LAWSUIT.

On April 20, 1994, Plaintiffs' then attorney, Richard B. Cuatto ("Cuatto"), sent Defendant's policy-issuing agent, First Hawaii Title, a letter informing First Hawaii Title of the existence of a possible claim that is adverse to the insured mortgage (hereinafter "Notice Letter"). In the Notice Letter, Cuatto informed First Hawaii Title that Dimiceli claimed an interest in the

Property "by virtue of an Agreement of Sale entered into between her and Edgar D. Kerr, Jr., on May 9, 1992, and recorded on July 28, 1992." See Ex. S to Defendant's Motion for Partial Summary Judgment (hereinafter all references to exhibits refer to those exhibits attached to Defendant's Motion for Partial Summary Judgment). Neither First Hawaii Title nor Defendant responded. Instead, the Notice Letter was filed away with the hand-written notation on it, "4-27-94 no claim info. only."

On February 9, 1999, after the Foreclosure Action was completed and the appeal settled, Plaintiffs' new attorney, Stewven B. Jacobson ("Jacobson"), sent Defendant a letter seeking reimbursement of attorneys' fees and costs incurred by Plaintiffs in defending the title to the Property. On February 24, 1999, Defendant sent Plaintiffs' attorney a letter acknowledging receipt of the February 9, 1999, letter.

On March 8, 1999, Jacobson faxed an incomplete copy of Plaintiffs' Policy to Defendant. On March 25, 1999, Defendant's attorney Neil F. Hulbert ("Hulbert") sent Jacobson a letter requesting a complete copy of the Policy. On April 9, 1999, Jacobson sent Hulbert the portions of the Policy which were missing.

On July 12, 1999, Hulbert sent a letter to Jacobson denying liability or responsibility for the claim. On October 18, 1999, Jacobson sent Hulbert a letter seeking reconsideration of Plaintiffs' claim and alleging that the denial was in bad faith. On November 4, 1999, Hulbert sent a letter to Jacobson again denying Plaintiffs' claim. On November 10, 1999, Plaintiffs sent a letter again challenging the denial of Plaintiffs' claim. On December 10, 1999, Hulbert sent a letter to Jacobson again denying Plaintiffs' claim. On December 21, 1999,

Jacobson sent another letter disagreeing with Defendants' denial. On January 14, 2000, Hulbert sent Jacobson a final letter again denying Plaintiffs' claim.

Plaintiffs filed the instant lawsuit on February 22, 2000, in which they sought to recover attorneys' fees and costs incurred in prosecuting the Foreclosure Action, except for those fees associated with Dimiceli's attack on the Morgan's title or the settlement thereof, see Exh. M at 3, and the amount of the deficiency judgment that was settled on appeal.

On March 21, 2002, the Honorable Helen Gillmor, United States District Judge, granted summary judgment against Plaintiffs and in favor of Defendant. Judge Gillmor found that: (1) Defendant had no duty to defend Plaintiffs based on the AOS & SOD claim because it arose after the date of the Policy; and (2) Defendant had no duty to defend against Dimiceli's claim based upon the unrecorded DROA contract because the Policy did not insure against easements, liens or encumbrances which were not recorded.

On appeal, the Ninth Circuit addressed whether Dimiceli's DROA-based claim fell within any of the Policy's insuring provisions and exceptions. In reversing this Court, the Ninth Circuit held that the 1994 Notice Letter gave sufficient notice to trigger Defendant's duty to defend. Exh. U at 2-3. The Ninth Circuit further found that the DROA-based claim (1) possibly did not fall under the exclusion for "easements, liens, or encumbrances, or claims thereof, which are not shown by the public records"; (2) did not fall under the exclusion for adverse claims "not known to the Company, not recorded in the public records . . . but known to the insured claimant and not disclosed in writing"; and (3) did not fall

under the exclusion for claims "which are not shown by public records but could be ascertained by an inspection of the and or by making inquiry of persons in possession thereof." See Ex. U.

In the instant Motion for Partial Summary Judgment, Defendant seeks an order that any claim for reimbursement of fees be subject to allocation between the DROA Claim and all other claims and that Defendant did not act in bad faith when it denied Plaintiffs coverage under the Policy.

II. STANDARD OF REVIEW

[omitted]

III. DISCUSSION

Defendant seeks partial summary judgment on (1) Plaintiffs' second cause of action for bad faith; and (2) a determination that Defendant is responsible for fees and costs related to defense of only the DROA claim.

A. BAD FAITH/PUNITIVE DAMAGES

[omitted]

B. ATTORNEY'S FEES

Defendant also seeks a determination that Defendant is responsible for fees and costs related to defense of only the DROA-based claim and is not liable to reimburse Plaintiffs for other, non-covered, claims.

Defendant argues that it may allocate defense costs between covered and non-covered claims. In the absence of Hawaii precedent on this issue, Hawaii courts tend to follow California law. In Aerosafe Int'l v. ITT

Hartford of the Midest, 1993 WL 299372 (N.D. Cal. 1993), the Court stated the standard regarding allocability as follows:

> Under California law, "once the duty to defend attaches, the insurer is obligated to defend against all the claims involved in [an] action, both covered and noncovered, until the insurer produces undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim." The general rule is this that an insurer under a duty to defend an action is liable for all defense fees and costs, even if some of the claims against the insured are beyond the coverage of the policy. The sole exception to this rule exists in cases where the insurer can "produce *undeniable evidence* of the allocability of specified expenses" to non covered claims.
>
> The "undeniable evidence" standard imposes a very heavy burden of proof upon insurers challenging defense expenses incurred by their insureds. The burden is justified because "the insurer having breached its contract to defend should be charged with a *heavy burden of proof* of even partial freedom from liability for harm to the insured which ostensibly flowed from the breach.". . .
>
> As a practical matter, in the typical case, allocation is "extremely difficult," if not "impossible." Even those very few courts which have allowed insurers who

breached the duty to defend to allocate have recognized this difficulty.

Aerosafe Int'l, Inc. v. ITT Hartford of the Midwest, 1993 WL 299372, at *3-4 (N.D. Cal. 1993) (emphasis in the original)(internal citations omitted). Here, Defendant has failed to produce evidence of allocability of costs, apart from simply asserting which claim(s) are covered and which are not. Therefore, Defendant has failed to carry its heavy burden of proof.

Rather, it appears that the claims are sufficiently intertwined that separation is impracticable. For example, the AOS was executed pursuant to the DROA, and it was argued that the two instruments acting in concert gave Dimiceli an interest in the Property. See Exh. Eli's Reply Memorandum to Plaintiff's Response to [Dimiceli's] Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and For Interlocutory Decree of Foreclosure Filed 2/22/94, at 5 ("At the time of the Morgan Mortgage, defendant Dimiceli was the buyer of a fully executed DROA [ ], had constructed a home on the subject property [ ], had paid over $100,000 in checks and cash to Defendant Kerr [ ], had taken physical possession of the home [ ], and was only awaiting the execution of the closing documents to have a recorded interest [ ]. She therefore had equitable and possessory interests in the subject property.")

Accordingly, the court DENIES Defendant's motion on this issue, but does so WITHOUT PREJUDICE. If, at a later time, Defendant can carry its heavy burden and demonstrate allocability, the court will allocate expenses.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, 10-15-2004.

/s/ Barry M. Kurren
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALBERT R. MORGAN, JR., et al., Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY, Defendant.

CIVIL NO. 00-00145 BMK

Honolulu, Hawaii
May 24, 2005
9:05 a.m.

NON-JURY TRIAL

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE BARRY M. KURREN
UNITED STATES MAGISTRATE JUDGE

[p. 103]

MR. JACOBSON: We've presented bills where we have removed items that we thought weren't appropriate to recover. We've already done that. They've had those since 1999. Implicit in that statement is that we think everything else in there is reasonable to be recovered.

And our – our burden as we read it from what the case law says, in this particular instance, in this situation, our burden is to show what our expenses are. Our burden is to – our burden is to really just show their existence. If they want to talk about allocability and if they want to dispute on the basis of reasonableness, we

don't think we have that burden because we don't believe that's what the cases say.

If the court – you know, if the court feels differently about it, you know, I think our reading is a fair reading of what the cases say. If the court feels differently about it, we would ask leave to reopen and then I would have to put myself on and, you know, I didn't want to do that on opening exam, but I guess that's what we'd have to do.

* * * * *

[pp. 109-110]

THE COURT: Well, you know, the – the fundamental obligation you have here, Mr. Jacobson, is to show the existence of the fees or damages that are related to the failure to defend. I don't believe by just simply indicating all of the fees that were incurred generally and, you know, damages that were involved in the foreclosure matter generally meets – meets that burden.

Moreover, I don't believe, you know, your testimony, you know, if I were to – to allow this to be reopened, would satisfy that where – where, you know, you – it would be as – as Mr. Hulbert indicated earlier, just merely, you know, your own statements with regard to the damages incurred. I – I believe you do have some burden with regard to the reasonableness of the fees, that they were necessarily incurred and are related to the – to those matters for which a breach of the duty to defend occurred.

You know, I haven't changed my mind. I believe the – the motion under the circumstances has merit. I

am going to grant the Defendant's Motion for Judgment as a Matter of Law and I'm denying your request to reopen the evidence.

* * * * *

MR. JACOBSON: Your Honor, may I make an offer of proof as to what I would testify if allowed to reopen?

MR. HULBERT: Your Honor, that's improper at this point.

THE COURT: Well, I – what is your offer of proof?

MR. JACOBSON: My offer of proof would be that either I or attorneys or paralegals or other legal personnel under my supervision performed all of the services and incurred all of the costs listed in the billings of the Torkildson Katz law firm, which are included in exhibit – Exhibit 213 and that all of those costs and fees that are not stricken – that have not been stricken out, and in fact some of which were – some of them were stricken out, arose as a result of Ms. Dimiceli's affirmative defense that she held title under an unrecorded DROA and that the Morgans had some awareness of it, or her other defense, which was simply to deny the existence of the Morgans' mortgage.

THE COURT: Okay. Well, you know, it is too late to be getting into those issues of proof after you have rested – rested, Mr. Jacobson. . . .

JULY 15, 2005
at 2 o'clock and 5 min. PM
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as Amended, Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY, Defendant.

CIVIL NO. 00-00145 BMK
FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISMISSAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISMISSAL

Plaintiffs Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 29, 1990 ("Plaintiffs") seek in this action reimbursement from Defendant Chicago Title Insurance Company ("Defendant") for attorney's fees and costs Plaintiffs incurred defending against claims made by Rosetta Ann Dimiceli ("Dimiceli") in a state foreclosure lawsuit. At trial on May 24, 2005, Defendant moved for judgment immediately after the close of Plaintiff's case. Because Plaintiffs failed to: provide proof of the reasonableness and necessity of the work performed; (2) submit evidence of a connection between the work performed and the

covered claims; and (3) show entitlement to other requested damages, Defendant's motion to dismiss is GRANTED.

STANDARD OF REVIEW

The Court will construe Defendant's motion for judgment as a motion to dismiss pursuant to Rule 52(c) of the Federal Rules of Civil Procedure.[1] Rule 52(c) provides in pertinent part:

> If during a trial without jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter a judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue ...

The Advisory Committee Notes explain that subdivision (c) authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." Fed.R.Civ.P. 52 advisory committee notes. The plain language of Rule 52 gives the

---

[1] After the 1991 amendments to the Federal rules of Civil Procedure, the Advisory Committee Notes explain that a "motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c)." Fed.R.Civ.P. 41 advisory committee's note. Rule 41(b) permitted a court to dismiss an action at the close of plaintiff's case-in-chief. See 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2573.1 (1995).

court discretion to grant a motion to dismiss before the close of evidence. Id. Rule 52 also requires that a court's judgment be supported by findings of fact and conclusions of law. Id.

BACKGROUND

In January 1992, Plaintiffs obtained a promissory note secured by a mortgage on Edgar D. Kerr's ("Kerr") property located in Kauai, Hawaii ("Property") in exchange for $300,000. Plaintiffs subsequently entered into an agreement with Defendant to provide title insurance.

In May-July 1992, Dimiceli brought the Property pursuant to an Agreement of Sale subject to the mortgage. Kerr defaulted on the mortgage and Plaintiffs filed a complaint for foreclosure in the Fifth Circuit Court of the State of Hawaii against Kerr and Dimiceli on August 16, 1993 ("Foreclosure Action"). Dimiceli opposed the Foreclosure Action by contending that she was entitled to the Property.

Plaintiffs filed the instant lawsuit on February 22, 2000 seeking damages for Defendant's failure to defend Plaintiffs against Dimiceli's claims in the Foreclosure Action. Although United States District Court Judge Helen Gillmor granted summary judgment to Defendant, the Ninth Circuit reversed, specifically holding that Defendant had a duty to defend against Dimiceli's claims.

At trial on May 24, 2005, Plaintiffs sought: (1) attorney's fees and costs incurred in defending themselves against Dimiceli's claims; (2) recovery of the consideration Plaintiffs gave up in settling Dimiceli's claims; (3) the income tax Plaintiffs will be required to

pay on their recovery as a result of Defendant's failure to defend; and (4) compensatory prejudgment interest.

Plaintiffs presented their case in chief by presenting only one live witness for approximately thirty minutes, Richard Sutton ("Sutton"), stipulations, and the record in the Foreclosure Action. Sutton testified only as to the reasonable hourly billing rate in the legal community for commercial litigation work. He did not review the files and was not asked to comment on any of the work performed on behalf of Plaintiffs in the foreclosure action. Plaintiffs failed to demonstrate that the attorney's fees and costs in the Foreclosure Action were reasonable or necessary. Plaintiffs also did not identify the work in the foreclosure action that was connected to the defense of Dimiceli's claims. Finally, Plaintiffs did not produce any evidence on the remaining consequential damage claims.

DISCUSSION

The Court has jurisdiction over the subject matter and parties in this case based upon diversity of citizenship. Because the title insurance policy in question was issued in Hawaii to Plaintiffs and applies to poperty in the State of Hawaii, the law of the State of Hawaii applies to this action. See Ticor Title Ins. Of Cal. V. Am. Res., Ltd., 859 F.2d 772, 774 (9th Cir. 1988); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that a federal court sitting in diversity is required to apply state law to questions of substantive law).

Plaintiffs seek attorney's fees they incurred defending against Dimiceli's claims in the Foreclosure Action. Under Hawaii state law, when a party seeks attorney's fees, the party must prove that the relief

requested is reasonably necessary to achieve the results obtained. Tirona v. State Farm Mut. Auto. Ins. Co., 821 F.Supp. 632, 636 (D. Haw. 1993); Keller v. La Rissa, Inc., 60 Haw. 1, 6, 586 P.2d 1017, 1021 (1978) (holding that attorney's fees prescribed through statute must be reasonably and necessarily incurred by the party seeking the award). Factors to determine the amount of the fee include:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client.

Sharp v. Hui Wahine, Inc., 49 Haw. 241, 244-45, 413 P.2d 242, 245-46 (1966).

Other jurisdictions, such as California, recognize the exceptional case that when an insurer fails to defend the insured, the burden shifts to the insurer to establish

that the fees are not reasonable. Aerojet-General Corp. v. Transport Indemnity Co., 70 Cal.Rptr.2d 118, 133-34 (Cal. 1977). California law however, does not relieve Plaintiffs' burden in making a prima facie showing that the work performed was reasonable and necessary for the results obtained. Because Plaintiffs failed to make such a showing, their claim for attorneys' fees and costs is legally insufficient.

Furthermore, in litigation against an insurer for damages arising out of the insurer's failure to defend, the insured must also prove that the fees and costs are connected to covered claims. State v. Pacific Indemnity Co., 75 Cal.Rptr.2d 69, 78 (Cal. Ct. App. 1998) (holding that the insured met their burden by demonstrating the hours worked and providing testimony that the work related to the defense). Here, the underlying Foreclosure Action involved a number of claims and issues having nothing to do with the defense of Dimiceli's claims. Simply dumping the record of the Foreclosure Action into evidence without any showing that the work was performed to defend against Dimiceli's claims renders the claim for fees legally insufficient.

Plaintiffs similarly are not entitled to damages for the remaining claims for consequential damages. Plaintiffs did not provide at trial any proof of an entitlement to damages on those specific claims.

CONCLUSION

Pursuant to the Findings of Fact and Conclusions of Law stated herein, the Court hereby orders that Defendant's Motion to Dismiss be granted and judgment be entered in Favor of Defendant and against Plaintiffs as to all claims.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 15, 2005.

/s/ Barry M. Kurren
United States Magistrate Judge

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OCTOBER 26, 2005
at 1 o'clock and 15 min. PM
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as Amended, Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY, Defendant.

CIVIL NO. 00-00145 BMK

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR (1) ENTRY OF AMENDED AND ADDITIONAL FINDINGS AND CONCLUSIONS and ALTERED AND AMENDED JUDGMENT and/or (2) NEW TRIAL, ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED ON JULY 15, 2005, AND ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

Before the Court is Plaintiffs Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 29, 1990's ("Plaintiffs") Motion for (1) Entry of Amended and Additional Findings and Conclusions and Altered and Amended Judgment and/or (2) New Trial

("Motion"). The matter came on for hearing on October 7, 2005. After careful consideration of the Motion, supporting and opposing memoranda, and arguments of counsel, the Court hereby Grants in Part and Denies in Part Plaintiffs' Motion and Amends its Findings of Fact and Conclusions of Law filed on July 15, 2005 to reflect an award in favor of Plaintiffs for nominal damages in the amount of $1.00. The remainder of Plaintiffs' claims are Denied pursuant to Rule 52(c) of the Civil Rules of Civil procedure for Plaintiffs' failure to prove compensatory damages. Finally, because Defendant is not the prevailing party, the Court Denies Defendant's Motion for Attorney's Fees and Costs.

BACKGROUND

On February 22, 2000, Plaintiffs filed the instant lawsuit against Defendant Chicago Title Insurance Company ("Defendant") seeking reimbursement for damages Plaintiffs incurred defending against claims made by Rosetta Ann Dimiceli ("Dimiceli") in a state foreclosure action. Although United States District Judge Helen Gillmor granted summary judgment as to all claims in favor of Defendant, the Ninth Circuit reversed, specifically holding that Defendant had a duty to defend against one of Dimiceli's claims.

At trial on May 24, 2005, Defendant moved to dismiss the case after Plaintiffs rested claiming that Plaintiffs failed to meet their burden of proof required to establish an entitlement of damages. The Court agreed with Defendant and dismissed the case pursuant to Rule 52(c) of the Federal Rules of Civil Procedure.[1] The Court

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[1] Rule 52(c) provides in pertinent part:

found that Plaintiffs failed to: (1) provide proof of the reasonableness and necessity of the work performed; (2) submit evidence of the connection between the work done and the covered claims; and (3) show entitlement to the other requested damages.

By the instant Motion, Plaintiffs seek to amend the Court's Findings of Fact and Conclusions of Law and Order of Dismissal filed on July 15, 2005, and/or be granted a new trial. Plaintiffs claim that the Court committed a manifest injustice of law by not awarding nominal damages for Defendant's failure to defend against Dimiceli's claims in state court. Plaintiffs argue that because the Ninth Circuit established that Defendant breached their duty to defend against one of Dimiceli's claims, Plaintiffs should be awarded at the very minimum nominal damages for the breach. Secondly, Plaintiffs cite to Sentinel Insurance Co. v. First Insurance Co., 76 Hawaii 277, 296, 875 P.2d 894, 913 (1994) for the proposition that the Court should have awarded damages in the amount of the consideration Plaintiffs surrendered in settling Dimiceli's adverse claims. Finally, Plaintiffs request to reopen the case to seek prejudgment interest, the payment of federal taxes,

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> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . .
>
> .

Fed.R.Civ.P. 52(c).

and reimbursement of fees and costs incurred in the foreclosure action.

STANDARD OF REVIEW

1. Motion to Alter or Amend Judgment

Under Rule 59(e) of the Federal Rules of Civil Procedure, a party may file a motion to alter or amend a motion. This procedure is "an extraordinary remedy which should be used sparingly." McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999)(citation omitted). A Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999); Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978) (holding that a motion to amend is not to be used "to relitigate old issues, to advance new theories, or to secure a rehearing on the merits.").

2. Motion for a New Trial

Rule 59(a)(2) of the Federal Rules of Civil Procedure provides that a trial court may grant a new trial "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed.R.Civ.P. 59(a)(2). The Ninth Circuit has articulated three grounds for granting new trials: "manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence." Brown, 588 F.2d at 710. The power to grant a motion for a new trial is based upon the sound discretion of the trial court. 11 Charles Alan

Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 2803 (Supp. 2005).

DISCUSSION

1. Plaintiffs are Entitled to Nominal Damages

Hawaii courts have articulated that when a defendant breaches a contract and the plaintiff fails to prove actual damages, the plaintiff should be awarded nominal damages. Ferreira v. Honolulu Star-Bulletin, 44 Haw. 567, 578, 356 P.2d 651, 657 (1960). The court explained that a party whose legal rights are invaded should be entitled to nominal damages. Id. See also Continental Cas. Co. v. Bd. of Educ. Of Charles County, 489 A.2d 536, 546 (Md. 1985) (explaining that when the insured fails to present proof of any damages caused by the breach of contract, the insured is entitled only to nominal damages).

In this case, the Ninth Circuit established that Defendant breached the insurance contract by defending against one of Dimiceli's claims. During trial however, Plaintiffs failed to establish an entitlement to compensatory damages. Therefore, because Defendant breached the insurance contract and Plaintiffs failed to prove compensatory damages, the Court hereby Awards nominal damages to Plaintiffs in the amount of $1.00.

2. Plaintiffs are not Entitled to Reimbursement for the Settlement Agreement

In Sentinel, the Hawaii Supreme Court held that where an insurance company fails to defend the insured and the insured settles the case in good faith, the "amount may then be utilized as presumptive evidence of

the breaching insurer's liability." Id. (citing Isaacson v. Cal. Ins. Guar. Ass'n., 750 P.2d 297, 308 (Cal. 1988)). The presumption applies in situations where the insured seeks reimbursement from the breaching insurer for payment of a settlement to a third party.[2]

The presumption does not apply in this situation because Plaintiffs did not pay money towards a settlement agreement. In fact, Plaintiffs received $30,096.64 from Dimiceli as part of the settlement. Plaintiffs also fail to cite any authority which applied the presumption to a situation where a party seeks reimbursement for the value of the consideration they would have received on top of the settlement amount, had the insurer properly defended against adverse claims. Finally, even if the Court entertained this argument, Plaintiffs have not submitted any evidence showing the amount they would have received had Defendant properly defended against Dimiceli's claims. Accordingly, the Court Finds that Plaintiffs are not entitled to the value of the consideration they gave up in settling their case with Dimiceli.

As for Plaintiffs' remaining claims, the Court finds these claims insufficient to amend its Findings and Conclusions and/or grant a new trial because the Court will not revisit these issues that have been previously presented at trial.

CONCLUSION

Pursuant to the Amended Findings of Fact and Conclusions of Law stated herein, the Court hereby

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[2] Both Sentinel and Isaacson involved situations where the insured paid a settlement to a third party.

Grants in Part and Denies in Part Plaintiffs' Motion. The Clerk of the Court is directed to enter Judgment in Favor of Plaintiffs for the nominal amount of $1.00. The remainder of Plaintiffs' claims are Dismissed pursuant to Rule 52(c) of the Federal Rules of Civil Procedure because Plaintiffs failed to prove the existence of compensatory damages. Finally, because Defendant is not the prevailing party, the Court Denies Defendant's Motion for Attorney's Fees and Costs.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 28, 2005.

/s/ Barry M. Kurren
United States Magistrate Judge

Case 1:00-cv-00145-BMK Document 237 Filed 03/02/2006
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as Amended, Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY, Defendant

CIVIL NO. 00-00145 BMK

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT

Before the Court is Plaintiffs Albert R. Morgan, Jr. and Alice H. Morgan's ("Plaintiffs") Motion for Relief From Judgment ("Motion"). Pursuant to LR 7.2(d), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the Motion, and the supporting and opposing memoranda, the Court Grants in part and Denies in Part Plaintiffs' Motion. The Court grants Plaintiffs' Motion only insofar as it seeks correction of an error of fact in the October 28, 2005 Order Granting In Part and Denying In Part Plaintiffs' Motion for (1) Entry of Amended and Additional Findings and Conclusions and Altered and Amended Judgment and/or (2) New Trial, Order Amending Findings of Fact and Conclusions of Law Filed on July 15, 2005, and Order Denying Defendant's Motion for Attorney's Fees and Costs ("October 28 Order"). The Court denies Plaintiffs' Motion as

to all other issues, denying Plaintiffs' request for relief from judgment.

BACKGROUND

On February 22, 2000, Plaintiffs filed this lawsuit seeking damages from Defendant Chicago Title Insurance Company ("Defendant") seeking reimbursement for expenses Plaintiffs incurred defending against claims made by Rosetta Ann Dimiceli ("Dimiceli") in a state foreclosure action. At trial on May 24, 2005, after Plaintiffs rested, the Court dismissed the case pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. This Court found that Plaintiffs' failed to: (1) submit evidence demonstrating that the attorney's fees and costs in the Foreclosure Action were either reasonable or necessary; (2) submit evidence showing that the work done in the Foreclosure Action was actually connected to the defense against Dimiceli's claims; and (3) produce any evidence showing that they were entitled to the remaining consequential damages claims.

On October 28, 2005, the Court amended its findings of fact and conclusions of law. See October 28 Order at 2, 5-6. The Court found that, because Defendant breached its insurance contract with Plaintiffs by failing to defend Plaintiffs against Dimiceli's claims, and because Plaintiffs failed to prove the existence of actual damages stemming from that breach, Plaintiffs were entitled to a nominal damages award of $1.00. Plaintiffs seek relief from the October 28 Order pursuant to Federal Rules of Civil Procedure Rule 60(b)(1).

LEGAL STANDARD

Rule 60 allows the court to reconsider its decisions and provides relief from judgment or order for a variety of enumerated reasons. See Fed.R.Civ.P 60. Rule 60(b)(1) states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1). A "motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Donaldson v. Liberty Mut. Ins. Co., 947 F. Supp. 429, 430 (D. Haw. 1996). Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact in order to prevent manifest injustice. See Mustafa v. Clark County School Dist., 157 F.3d 1169, 1178-79 (9th Cir. 1998); Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612, 616 (D.Haw. 1987), rev'd on other grounds, 863 F.2d 617 (9th Cir. 1988). Mere disagreement with a previous order is an insufficient basis for reconsideration, and reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. Hawaii Stevedores, Inc. v. HT & T Co., 363 F. Supp. 2d 1253, 1269 (D. Haw. 2005). "Whether or not to grant reconsideration is committed to the sound discretion of the court." Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing

Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000)).

DISCUSSION

Plaintiffs argue that the Court committed two errors. First, Plaintiffs claim the Court incorrectly concluded that "Plaintiffs received $30,096.64 from Dimiceli as part of the settlement." (October 28 Order at 6). The record discloses that Plaintiffs are correct, They did not receive $30,096.64 as part of the settlement agreement with Dimiceli. Instead, $30,096.64 represents the amount Plaintiffs claim they surrendered to Dimiceli as part of the settlement agreement. The Court hereby corrects the October 28 Order to reflect that Plaintiffs did not, in fact, receive $30,096.64 in the settlement agreement.

This error however, does not entitle Plaintiffs to relief from judgment. Plaintiffs fail to show how the fact that they did not receive or pay any money in exchange for settlement affects this Court's finding that Plaintiffs did not produce evidence at trial supporting their claim that they are entitled to reimbursement from Defendants. Or, put differently, that the fees and costs that Plaintiffs claim, are in fact, connected to the amounts they seek, or proved at trial. Plaintiffs again rely on the Hawaii Supreme Court's holding in Sentinel Ins. Co. v. First Insurance, 875 P.2d 894, 913 (1994). Sentinel is inapplicable because, as explained in the October 28 Order, it holds that a settlement amount paid by the insured to a third party is presumptive evidence of the breaching insurer's liability for its failure to defend. Id. at 913 (emphasis added). As this court conclusively found, Plaintiffs paid nothing to Dimiceli, the third party. See October 28 Order at 6. Thus, Plaintiffs' lack of payment for settlement cannot be used as presumptive evidence of the

amount of Defendant's liability, when Plaintiffs failed to produce evidence at trial that their costs were, in fact, related to Defendant's failure to defend. Sentinel is unavailing to Plaintiffs.

Plaintiffs also now cite two California cases in support of their Motion, Earth Elements, Inc. v. National American Insurance Co. of California, 48 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996) and Richie v. Anchor Casualty Co., 286 P.2d 1000 (Cal. Ct. App. 1955). Plaintiffs did not present either of these cases prior to trial, or in any of their post-trial motions until now. As these cases could have been presented at any time before, during, or immediately after trial, the Court cannot base a motion for reconsideration on them. See Hawaii Stevedores, Inc., 363 F. Supp. 2d at 1269 (D. Haw. 2005). Moreover, these cases do not support Plaintiffs' argument any more than Sentinel does. In Earth Elements, the court held that the amount the plaintiffs paid to settle a covered claim was presumptive evidence of the amount the defendant insurer was required to pay for breach of its duty to defend. Earth Elements, 48 Cal.Rptr.2d at 402. Similarly, in Ritchie, the California court held that a "settlement, or stipulated judgment entered thereon, becomes presumptive evidence of the liability of the insured and the amount thereof." 286 P.2d 1003. There is no dispute here that Defendant here breached its duty to defend Plaintiffs; or that these holdings are correct, presuming, of course, that the plaintiffs submitted competent evidence supporting their claims for damages. In this case, however, Plaintiffs did not support their claims for damages, and these cases are thus, unavailing for the same reasons as is Sentinel.

Second, Plaintiffs argue that the Court erred by concluding that Plaintiffs failed to submit evidence showing the amount they would have received had Defendant

properly defended against Dimiceli's claim. Plaintiffs claim that their proposed conclusions as well as the evidence submitted into the record provides sufficient proof of the amount of damages and how that amount could be calculated. This Court disagrees and has so held. Plaintiffs' proposed damages are just that—proposed. Plaintiffs are not entitled to these damages because they failed to provide proof at trial of: (1) the reasonableness and necessity of the work performed; (2) the connection between the work that was done and their covered claims; (3) or their entitlement to the other damages requested. Plaintiffs are simply attempting to relitigate this Court's decision, making the same arguments that were presented at trial and later.

Last, Plaintiffs submit a recent Ninth Circuit decision, Living Designs, Inc. v. E.I. Dupont De Nemours & Co., 431 F.3d 353 (9th Cir. 2005), which they believe supports their argument that the value of the claim they yielded in settlement to Dimiceli was not too speculative. In Living Design, the defendants fraudulently withheld material evidence to induce the plaintiffs to settle the underlying litigation against the defendants. 431 F.3d at 358. When the fraud was discovered, plaintiffs asserted claims in federal court against defendants "under RICO and state common law claims of fraud, conspiracy, misrepresentation, abuse of process, infliction of emotional distress, interference with prospective economic advantage, negligence, and spoliation of evidence." Id. Living Designs' plaintiffs claimed that, but for defendants' fraud, they would have requested more money or refused to settle. Id. The district court granted defendants' summary judgment because of the plaintiffs "inability to prove either the fact or amount of damages with reasonable certainty." Id. at 366 (citations omitted). The Ninth Circuit reversed, explaining that the plaintiffs' citations of comparable settlements of much larger amounts

and expert testimony was "sufficient to create a triable issue of fact and is not so speculative that damages are incapable of calculation." Id. at 368 (emphasis added).

Living Designs is inapplicable on several levels. First, the procedural postures of the present action and Living Designs are decidedly different. Living Design was reversed on a motion for summary judgment because the Ninth Circuit found there were genuine issues of material fact for the trier of fact to decide. In contrast, this Court found that Plaintiffs' evidence at trial was simply insufficient to support their claims. The Ninth Circuit did not hold that Living Designs' plaintiffs had proved their case, but only that they had raised a genuine issue of material fact precluding dismissal of the case on a motion for summary judgment. Id. at 369.

Moroever, Living Designs involved the amount of damages plaintiffs suffered as a result of reaching a settlement agreement that was based on fraud. It has nothing to do with an insurance company's failure to defend, or whether the insured is entitled to a judgment in the speculative amount surrendered as part of a settlement agreement. In addition, there are no claims of fraud or criminal action here by Defendants that induced Plaintiffs to enter the settlement agreement with Dimiceli. Plaintiffs' reliance upon Living Designs is misplaced.

Plaintiffs have not demonstrated sufficient reasons why this Court should reconsider its prior decision. Nor have they set forth facts or law of a strongly convincing nature to persuade the Court to reverse its prior decisions in this matter. Plaintiffs' Motion is DENIED.

CONCLUSION

1. The Court Grants in Part Plaintiffs' Motion and hereby corrects the October 28 Order to reflect that Plaintiffs did not receive $30,096.64 in their settlement agreement with Dimiceli.

2. Plaintiffs' Motion for Relief from Judgment is otherwise Denied.

IT IS SO ORDERED.

/s/ Barry M. Kurren
United States Magistrate Judge
Dated: March 1, 2006

(USDC Trial Exhibit 106)
5TH CIRCUIT COURT
STATE OF HAWAII
FILED
'96 APR 17 A8:43
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, etc., Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHART; KAUAI SERVICES, INC., a Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1); COUNTY OF KAUAI (Doe No. 2); and DOES 3-50, Defendants.

Civil No. 93-0199 (Foreclosure)
Heard: October 9, 1995
Time: 1:00 p.m.
Judge: Hon. George M. Masuoka

AMENDED JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

Pursuant to H.R.C.P. Rules 54(a) and 58 and the Orders filed in this action on April 3 and December 7, 1995, there being no just reason for delay in the entry of a

final judgment as to all matters resolved in said Orders and the Court having so found and having directed the entry of a final judgment in its Order of December 7, 1995, (at 11-12), as well as so finding in this Judgment, Decree of Foreclosure and Order of Sale, IT IS HEREBY DECLARED, DECREED, ORDERED and FINALLY ADJUDGED as follows:

1. Judgment, a Decree of Foreclosure and an Order of Sale are entered in favor of Plaintiffs and against the other parties, and in favor of the United States of America and against the other parties, to the extent set forth in this Judgment.

2. Plaintiffs Albert R. Morgan, Jr., and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 as amended ("Plaintiffs"), have and hold, as mortgagees, a first mortgage lien upon the real property commonly known as 5095 Napo'okala Circle, Princeville, Kauai, Hawaii, legally described in Exhibit A hereto ("Property"), under a mortgage recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau of Conveyances") on January 10, 1992, as Document No. 92-003636 ("Mortgage").

3. At the time the Mortgage was recorded, Defendant Edgar D. Kerr, Jr. also known as Edgar Kerr ("Kerr") owned and held record title to the Property. Defendant Kerr executed the mortgage, as mortgagor, in favor of the Plaintiffs.

4. The Mortgage was recorded to secure the performance of Defendant Kerr's obligations to Plaintiffs under a promissory note from Kerr to Plaintiffs in the principal amount of $300,000 ("Note").

5. $291,878.88 of the $300,000.00 loaned by Plaintiffs to Kerr was not paid to him, but rather used for the benefit of the Property. That amount was used to satisfy previous mortgage loans secured by the property ($267,770.98), or to pay unpaid real property taxes ($862.00), loan and escrow costs ($20,679.18), and prepaid interest ($2,566.74). The mortgage loans repaid with Plaintiffs' largely replaced earlier loans to which Defendant Rosetta Ann Dimiceli, also known as Rosetta Scott, Rosetta Cable and Rosetta Ehrhart ("Dimiceli"), had agreed and consented, and/or which Dimiceli had helped Kerr to obtain.

6. On or about May 9, 1992, Defendants Kerr and Dimiceli entered into a written Agreement of Sale ("Agreement of Sale I") in which Kerr agreed to sell his interests in the Property to Dimiceli. In Agreement of Sale I, Kerr and Dimiceli expressly recognized the existence and prior recording of Plaintiffs' Mortgage by describing the real property Kerr was agreeing to sell and Dimiceli was agreeing to buy as being "subject to" Plaintiffs' Mortgage, and by expressly agreeing that Dimiceli's rights under Agreement of Sale I were "subject to" Plaintiffs' Mortgage, among other provisions. Agreement of Sale I was recorded in the Bureau of Conveyances on July 28, 1992 as Document No. 92-121191. The terms of Agreement of Sale I modified and superseded any Differing terms in any prior agreements between Kerr and Dimiceli.

7. On or about November 2, 1992, Defendants Dimiceli and Kerr entered into a Satisfaction Deed agreement modifying Agreement of Sale I. In the Satisfaction Deed agreement, Kerr agreed to transfer record title to the Property to Dimiceli, subject to Plaintiffs' Mortgage. Kerr agreed to do so, even though Dimiceli had not yet paid the principal and other amounts she had agreed to pay to Kerr under Agreement

of Sale I, in return for Dimiceli's promise to pay all such amounts to Plaintiffs instead, in partial satisfaction of the obligations to Plaintiffs secured by Plaintiffs' Mortgage.

8. The Satisfaction Deed agreement was recorded in the Bureau of Conveyances on November 12, 1992, as Document No. 92-182386. It transferred record title to the Property to Dimiceli, subject to the Mortgage. Dimiceli has owned and held record title to the Property since November 12, 1992, subject to the Mortgage.

9. On or about February 1, 1993, Defendants Dimiceli, Kauai Services, Inc. ("Kauai Services"), Dennis S. Nimkie and Greta L. Nimkie (the latter two, collectively, "Nimkies") entered into an unrecorded Agreement of Sale ("Agreement of Sale II") in which Dimiceli agreed to sell an undivided two-thirds interest in the Property to Kauai Services, and granted Kauai Services an option to purchase the remaining one-third interest, in return for Kauai Services' promise to cause repayment of the $300,000 principal balance of Plaintiffs' Mortgage. The provisions of Agreement of Sale II included a personal guaranty of Kauai Services' obligations thereunder by the Nimkies. Nimkies have occupied the property since February 1993.

10. On March 15 and 16, 1993, the Administrator of the Small Business Administration ("SBA"), as mortgagee, recorded mortgages against the Property in the Bureau of Conveyances as Document Nos. 93-040787 and 93-041675 ("SBA Mortgages"). The SMA Mortgages had been executed by Dimiceli as mortgagor.

11. On August 26, 1994, in this action, the Court ordered Dimiceli and the Nimkies to make monthly payments of $2,104.66 to the Clerk of the Court, from and after July 28, 1994, pending further Orders of the Court.

$2,104.66 is the amount of the monthly payments Dimiceli originally agreed to make to Kerr in Agreement of Sale I, and thereafter agreed to make to Plaintiffs in the Satisfaction Deed agreement.

12. On November 14, 1994, Defendant Princeville at Hanalei Community Association (Doe No. 1) ("Association") recorded notice of a $654.66 lien against the Property in the Bureau of Conveyances, as Document No. 94-191850, for allegedly unpaid community association dues.

13. On March 15, 1995, Defendant County of Kauai (Doe No. 2) recorded a $3,883.17 lien against the Property in the Bureau of Conveyances, as Document No. 95-041019, for unpaid real property taxes due and owing for the 1993-1994 and 1994-1995 property tax periods.

14. On May 24, 1995, Plaintiffs recorded a notice of the pendency of this action in the Bureau of Conveyances as Document No. 95-069240. No liens or encumbrances, other than those listed in Exhibit A or in the foregoing paragraphs, had been recorded against the Property prior to the recording of the notice of pendency of action.

15. Plaintiffs' Mortgage constitutes a valid priority lien on the Property, binding upon and prior to the interests of all of the Defendants herein, save and except the liens of Defendant County of Kauai for unpaid real property taxes, and subject only to certain prior reservations, declarations, restrictions, covenants, conditions and rights of entry described in Exhibit A.

16. To the extent the $300,000.00 they loaned to Kerr was used for the benefit of the Property, Plaintiffs are entitled to the imposition of an equitable mortgage or lien upon the Property, effective as of January 10, 1992, securing its repayment and the payment of interest thereon and fees and costs incurred in collection.

17. SBA's Mortgages are valid and constitute enforceable liens in accordance with their terms, senior in priority to the interests of all of the parties to this action except the Plaintiffs, and those interests senior to those of the Plaintiffs.

18. Plaintiffs are third-party creditor beneficiaries of Dimiceli's promise, in the Satisfaction Deed agreement, to pay them the amounts she had previously agreed to pay to Kerr in Agreement of Sale I, in order to partially satisfy Kerr's obligations to Plaintiffs, and in return for Kerr's immediate transfer of record title to her.

19. If Agreement of Sale II is still in effect, Plaintiffs are third-party creditor beneficiaries of Kauai Services' and Nimkies' promises, in Agreement of Sale II, to cause the payment of the $300,000 principal amount of the Mortgage.

20. The lien of Plaintiffs' Mortgage (or equitable mortgage or lien) secures the performance of all obligations owed to the Plaintiffs under the Note and Mortgage (or equitable mortgage or lien), including, but not limited to, those obligations which Defendant Dimiceli promised and agreed to partially satisfy, in the Satisfaction Deed agreement, in return for an immediate transfer of record title to the Property to her, and, if Agreement of Sale II is still in effect, those obligations Kauai Services and Nimkies agreed to satisfy in Agreement of Sale II.

21. Given the terms to which Dimiceli agreed in Agreement of Sale I, the Satisfaction Deed agreement, and Agreement of Sale II, Dimiceli cannot prevail on her defense that she and Kerr allegedly entered into an unrecorded DROA agreement in March 1989, that the terms of the alleged unrecorded agreement prohibited Kerr from further mortgaging the Property without Dimiceli's consent, that Plaintiffs were subject to that

provision because they were allegedly aware of Dimiceli's claim to equitable ownership of the Property under an unrecorded DROA Agreement, that Dimiceli did not consent in advance to the Mortgage, and that she can avoid the Mortgage for lack of such advance consent.

22. In any event, Plaintiffs were not on notice of any claim of Dimiceli to equitable ownership of the Property, under an unrecorded 1989 DROA Agreement or otherwise.

23. The obligations owed to Plaintiffs under the Note and Mortgage have been defaulted upon. Payments due thereunder have not been made, property insurance policies with loss payable clauses payable to Plaintiffs have not been procured, and the Property has become subject to liens because of non-payment of community association dues and property taxes.

24. Defendant Kerr now owes Plaintiffs, and Plaintiffs shall have and recover from Kerr, the following amounts due under the Note and Mortgage plus attorneys' fees and other costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $115.09 ($300,000 x 14% x 1/365 days) from and after July 9, 1995:

Principal	$300,000.00
Interest through July 9, 1993	3,835.62
Late Fees	24,586.85
Interest from July 9, 1993 through July 8, 1995	64,390.68
Preliminary Title Report	553.50
Insurance	2,776.00
Service Charges	1,035.00
TOTAL	$397,177.65

25. The obligations Defendant Dimiceli owes Plaintiffs under the Satisfaction Deed agreement have been

defaulted upon and had been defaulted upon prior to the entry of this Court's Order of August 26, 1994, and Dimiceli now owes Plaintiffs, and Plaintiffs shall have and recover from Dimiceli, the following amounts thereunder plus attorneys' fees and costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $66.60 per day ($221,000 x 11% x 1/365 days) from and after July 28, 1995:

Interest Due Prior to July 28, 1994	$ 10,569.90
Principal Balance Due July 28, 1994	221,000.00
Interest due July 28, 1994 through through July 27, 1995	21,046.60
Late Fees	24,856.85
TOTAL	$277,203.35

26. The obligations of Defendants Dimiceli and Nimkies under this Court's Order of August 26, 1994, have been defaulted upon, in that Dimiceli and the Nimkies failed to make the $2,104.66 monthly payment due September 28, 1994, and have failed to make all monthly payments due after that date.

27. As a result of the above-described defaults, and each of them, Plaintiffs are entitled to foreclose the Mortgage, and the Mortgage shall be and hereby is foreclosed. The Property shall be sold at a public auction or by private sale, subject only to the subsequent approval of and confirmation by the Court, liens for unpaid real property taxes, the prior reservations, declarations, covenants, conditions and rights of entry described in Exhibit A, and SBA's right of redemption under 28 U.S.C. § 2410(c).

[Sale procedures and Exhibit A omitted]

DATED: Lihue, Hawaii, April 17, 1996.

/s/ George M. Masuoka
Judge of the above-entitled
Court

(USDC Trial Exhibit 147)
5TH CIRCUIT COURT
STATE OF HAWAII
FILED
'98 JUN 26 P2:35
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, etc., Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHART; KAUAI SERVICES, INC., A Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1); COUNTY OF KAUAI (Doe No. 2); and DOES 3 50,
Defendants.

Civil No. 93-0199 (Foreclosure)
Hon. George M. Masuoka

DEFICIENCY JUDGMENT

Pursuant to the Order Granting in Part and Denying in Part (1) Defendant Dimiceli's Motion to Alter or Amend Judgment and for other Relief, filed April 25, 2006; (2) Defendant Dimiceli's Motion for Relief, filed

November 27, 1996; and (3) Plaintiffs' Motion for Entry of Final Deficiency Judgment, filed December 5, 1996, filed concurrently herewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs shall have and recover from Defendants Edgar D. Kerr ("Kerr"), Kauai Services, Inc., Dennis S. Nimkie and Greta L. Nimkie, jointly and severally, the principal amount of $295,877.20, plus interest of $113.49 per day and attorneys' fees of $28.37 per day from and after July 2, 1996 until the day this judgment is entered.

2. This Deficiency Judgment amends the prior Amended Judgment, Decree of Foreclosure and Order of Sale, against Defendant Kerr, filed in this action on April 17, 1996, and the prior Judgment against Defendants Kauai Services, Inc., Dennis S. Nimkie and Greta L. Nimkie, filed in this action on May 22, 1996, to reflect the reduction on the amounts owed by said Defendants resulting from the foreclosure sale in this action.

3. Plaintiffs shall have and recover from Defendant Dimiceli, jointly and severally with the defendants named above in paragraph 1, the amount of $30,096.64. Said amount shall be included in the total amount that the defendants named in paragraph 1 above are liable to plaintiffs.

4. Post-judgment interest shall run on this judgment as provided by law.

5. This Deficiency Judgment amends the prior Amended Judgment, Decree of Foreclosure and Order of Sale, filed in this action on April 17, 2006.

6. There is no just reason for delay in the entry of this Deficiency Judgment. It is therefore expressly directed that this Deficiency Judgment be entered as a final judgment pursuant to HRCP Rule 56(b).

7. The Fifth Claim for Relief in Plaintiffs' First Amended Complaint remains pending.

DATED: Lihue, Hawaii, June 26, 1998.

/s/ George M. Masuoka
Judge of the above-entitled Court

(USDC Trial Exhibit 160)
5TH CIRCUIT COURT
STATE OF HAWAII
FILED
'98 SEP 24 A8:33
LORNA M.L. CHING
CLERK

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ROSETTA ANN DIMICELI

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, etc., Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHART; KAUAI SERVICES, INC., A Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1);

COUNTY OF KAUAI (Doc No. 2); and DOES 3-50, Defendants.

Civil No. 93-0199 (Foreclosure)
Hearingf Time: 1:00 p.m.
Judge: Hon. George M. Masuoka

ORDER GRANTING DEFENDANT DIMICELI'S MOTION TO STRIKE PLAINTIFFS' MOTION TO ALTER AND AMEND ORDER AND DEFICIENCY JUDGMENT FILED JUNE 26, 1998 (FILED JUNE 6, 1998) FOR LACK OF JURISDICTION AND DENYING PLAINTIFFS' MOTION TO ALTER AND AMEND ORDER AND DEFICIENCY JUDGMENT FILED JUNE 26, 1998

Plaintiff's Motion to Alter and Amend the Order and Deficiency Judgment Filed June 26, 1998 ("Motion to Amend") and Defendant Dimiceli's Motion to Strike Plaintiff's Motion To Alter or Amend Order and Deficiency Judgment Filed June 26, 1998 (Filed July 6, 1998) for Lack opf Jurisdiction ("Motion to Strike") came on for hearing before the Honorable George M. Masuoka on Tuesday, September 15, 1998 at 1:00p.m., Plaintiffs being represented by Pail L. Sulla, Jr. and Defendant Dimiceli being represented by Paul A. Schraff and no other parties having appeared.

Upon consideration of the moving and opposing papers on both motions, the oral arguments and the records and files herein, the Court hereby GRANTS the Motion to Strike on the ground that the Motion to Amend was not properly served within ten days after entry of the order and judgment it seeks to amend. Although the Court therefore lacks jurisdiction to consider the Motion to Amend, for the guidance of the parties, were the Court to reach the merits of the Motion to Amend, the Court

would not award attorneys' fees or pre-judgment interest. The deficiency judgment is comprised of unpaid rental payments which were due, not because of any agreement between the parties, but because of a court order. This Court foreclosed Dimiceli's interest because this Court found the Satisfaction Deed which she signed meant that her agreement with Kerr was to buy the property subject to Plaintiff's mortgage, but Dimiceli did not assume that mortgage. In a foreclosure action, this Court is sitting in equity. While this Court concludes that it is equitable for Dimiceli to be liable for the Cour-ordered rental payments which were not made, Plaintiffs have no legal right, and the Court does not believe it equitable, to award Plaintiffs either attorneys' fees or pre-judgment interest on that amount.

SO ORDERED.

Dated: Lihue, Hawaii, September 24, 1998.
/s/ George M. Masuoka
Judge of the above-referenced Court

FILED
APR 30 2007
CATHY A. CATERSON, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT R. MORGAN; et al., Plaintiffs -Appellants,	NOS. 05-17145
v.	District of Hawaii (Honolulu)
CHICAGO TITLE INSURANCE COMPANY, Defendant-Appellee,	D.C. NO. CV-00-00-145 BMK

ORDER

Before: FERNANDEZ, GRABER, and IKUTA, Circuit Judges.

The petition for panel rehearing is denied.

FILED
JUN -4 2007
CATHY A. CATERSON, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT R. MORGAN; et al., Plaintiffs -Appellants,	NOS. 05-17145, 06-16175 & 06-16292
v.	District of Hawaii (Honolulu)
CHICAGO TITLE INSURANCE COMPANY, Defendant-Appellee,	D.C. NO. CV-00-00145 BMK

AMENDMENT TO ORDER

Before: FERNANDEZ, GRABER, and IKUTA, Circuit Judges.

The order filed April 30, 2007, is amended to include docket Nos. 06-16175 and 06-16292. The petition for panel rehearing is denied. An amended mandate shall be issued by the clerk to include docket Nos. 06-16175 and 06-16292.

(USDC Trial Exhibit 141)
5TH CIRCUIT COURT
STATE OF HAWAII
FILED
'96 DEC 5 A8:09
LORNA M.L. CHING
CLERK

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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, etc., Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHART; KAUAI SERVICES, INC., a Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1); COUNTY OF KAUAI (Doe No. 2); and DOES 3-50, Defendants.

Hearing Date: December 23, 1996
Time: 1:00 p.m.
Judge: Hon. George M. Masuoka
Civil No. 93-0199 (Foreclosure)
NO TRIAL DATE SET

PLAINTIFFS' MOTION FOR ENTRY OF A FINAL DEFICIENCY JUDGMENT AGAINST DEFENDANTS KERR, DIMICELI, KAUAI SERVICES, INC. AND NIMKIES ON PLAINTIFFS' FIRST THROUGH FOURTH CLAIMS FOR RELIEF

Plaintiffs Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 ("Plaintiffs"), hereby move for entry of a deficiency judgment on the First, Second, Third and Fourth Claims for Relief in Plaintiffs' First Amended Complaint filed August 11, 1995, against Defendants Edgar D. Kerr, Jr. aka Edgar Kerr ("Kerr") (First and Second Claims), Rosetta Ann Dimiceli aka Rosetta Scott, Rosetta Coble and Rosetta Ehrhart ("Dimiceli") (Third Claim), and Kauai Services, Inc. ("Kauai Services"), Dennis S. Nimkie and Greta L. Nimkie (collectively "Nimkies").

The deficiency judgment sought against Defendants Kerr, Kauai Services and Nimkies is for $295,877.20 of principal, plus interest of $113.49 per day and additional recoverable attorneys' fees of $28.37 per day from and after July 2, 1996.

* * * * *

MEMORANDUM IN SUPPORT OF MOTION

* * * * *

Attorneys' Fees. [pp. 5-6] Plaintiffs' attorneys' fees incurred herein will be not less than $154,037.75, due to the scorched-earth, everything-including-the-kitchen-sink tactics adopted by the defense. (Declaration, para. 7)

However, under HRS § 607-14, Plaintiffs' recoverable fees are limited to twenty-five percent of the amount owing to them, exclusive of costs and attorneys' fee, and they can only recover that lesser amount. That lesser amount is $111,306.31 (25% of $445,225.25).

* * * * *

Total Owed Prior To Application of Foreclosure Credit. [pp. 7-8] The total amount to which the foreclosure credit should be applied therefore is $563,019.17, calculated as follows:

Judgment Amount Prior to Fees and Costs	$441,015.93
Costs	10,696.93
Attorneys' Fees	111,306.31
TOTAL	$563,019.17

* * * * *

[p. 8] The credit Kerr, Kauai Services and Nimkies should receive from the closing of the foreclosure sale, against the amounts they owe the Plaintiffs under the earlier judgments, is $267,141.97 ($275,000.00 minus $7,858.03). Those amounts are calculated as follows:

* * * * *

[p. 10] After the $267,141.97 credit is applied to the $563,019.17 amount they owe, Kerr, Kauai Services and Nimkies still owe Plaintiffs $295,877.20. $563,019.17 minus $267,141.97 is $295,877.20.

* * * * *

C. The Deficiency Amounts Due [p. 11]

The amounts of interest and principal to which the foreclosure credit is applied are those due July 1, 2006 – the day the foreclosure sale closed.

Since that date, interest at a per diem rate of $113.49 has been accruing on the post-sale principal balance ($295,977.20 x 14% x 1/365). Fourteen percent is the interest rate payable under the Note. (See Amended Judgment, para. 24)

The increasing amount of pre-deficiency-judgment interest increases the amount of attorneys' fees recoverable under the statutory cap, by $28.37 per day ($113.49 x 25%), which enables Plaintiffs to recover more (but still far from all) of their fees. See HRS §607-14.

* * * * *

DECLARATION OF COUNSEL

* * * * *

[pp. 4-18, 14 page task-based description of the work performed and the charges for it]

* * * * *

(USDC Trial Exhibit 218)
STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
NOV. 12, 1992 09:44 AM
Doc. No(s) 92-183386
/s/ E. FURUKUWA
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX: $0.00
REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL ( )
PICKUP ( )
Walton D.Y. Hong, Attorney at Law
3135-A Akahi Street
Lihue, Hawaii 96766
TITLE OF DOCUMENT: SATISFACTION DEED
PARTIES TO DOCUMENT:
GRANTOR: EDGAR D. KERR, JR., husband of Genna Suzanne Kerr
GRANTEE: ROSETTA ANN DIMICELI, unmarried
PROPERTY DESCRIPTION: TAX KEY: (4th) 5-4-19-22

SATISFACTION DEED

KNOW ALL MEN BY THESE PRESENTS:

This Indenture, made as of this 2 day of November, 1992, by and between EDGAR D. KERR, JR., husband of Genna Suzanne Kerr, herein called the "Grantor," and ROSETTA ANN DIMICELI, unmarried, whose residence is 5095 Napookala Circle, Princeville, HI 96722, and whose mailing address is P. O. Box 104, Hanalei, HI 96714, herein called the "Grantee,"

WITNESSETH:

* * * * *

Whereas, the Grantor and Grantee, pursuant to that certain Deposit Receipt, Offer and acceptance, reference dated 14 March 1989, herein called the "DROA," for the sale and purchase of the real property described in Exhibit "A," attached hereto and made a part hereof, entered into that certain Agreement of Sale, dated May 9, 1992, and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 92-121191, herein called the "Agreement of Sale"; and

Whereas, under the terms of the DROA, neither party was to encumber the subject property; and

Whereas, the Grantor made and entered into that certain Mortgage, dated December 30, 1991, and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 92-3636, herein called the "Mortgage," with Albert R. Morgan, Jr., and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust Under Agreement Dated September 20, 1990, as amended, herein called the "Mortgagee," in the principal amount of $300,000.00; and

Whereas, the Grantor is currently in default of the Mortgage, and has reached agreement with the Grantee wherein the Grantee will apply all sums owing by the Grantee to the Grantor under the Agreement of Sale, on account of the Grantor's obligation under the Mortgage and reserving the right of the Grantee to recover any additional damages which the Grantee may incur or suffer as a result of Grantor's breach of the DROA; and

Whereas, the Grantor is willing to convey the subject property described in Exhibit "A" hereto and

subject of the said Agreement of Sale to the Grantee in acknowledgment of Grantee's payment of all sums owing to the Grantor under the Agreement of Sale to the Mortgagee against the obligations under the Mortgage,

Now, therefore, for and in consideration of the payment by the Grantee to the Mortgagee of the principal owing to the Grantor under the said Agreement of Sale, the Grantor does hereby grant and convey unto the Grantee, as Tenant-In-Severalty, the property described in Exhibit "A", attached hereto and incorporated herein.

* * * * *

[p. 5] And the Grantee, in consideration of the foregoing, hereby covenants with the Grantor that Grantee will pay all principal amounts owing to the Grantor under the Agreement of Sale, to the Mortgagee in such manner as may be agreed upon between the Grantee and the Mortgagee, provided, however, that in no event shall the Grantee be obligated to the Grantor to pay more than the amounts which may be owing under the Agreement of Sale by the Grantee to the Grantor.

IN WITNESS WHEREOF, the Grantor and Grantee have hereunto set their hands this 2 day of November, 1992.

Grantor: /s/ Edgar D. Kerr, Jr.
Grantee: /s/ Rosetta Ann Dimiceli

[notarizations omitted]

EXHIBIT A

All of that certain parcel of land situate at Hanalei, Halelea, Island and County of Kauai, State of Hawaii, to wit:

Lot 22, area 13,458 square feet, as delineated on the map entitled "PRINCEVILLE AT HANALEI – LOT 17 SUBDIVISION," which said map was filed in the Bureau of Conveyances of the State of Hawaii on May 18, 1978, as File Plan No. 1557,

* * * * *

SUBJECT, HOWEVER, to the following:

* * * * *

5. That certain mortgage . . . recorded in said Bureau on January 10, 1992, as Document No. 92-003636.

* * * * *

71

(2)

No. 07-445

FILED
NOV 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ALICE H. MORGAN, TRUSTEE OF THE MORGAN FAMILY TRUST UNDER AGREEMENT DATED SEPTEMBER 20, 1990, AS AMENDED,

Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

NEIL F. HULBERT*
**Counsel of Record*
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LAURA PAVLOFF COUCH
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Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit Court of Appeals' ("Ninth Circuit") Memorandum of Opinion filed April 6, 2007, affirming in part and reversing in part the judgment of the District Court ("Memorandum of Opinion"), followed the decisions of this Court and properly determined that the District Court followed Hawai'i law regarding the burden of proof in insurance coverage disputes.

II. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit's Memorandum of Opinion correctly recognized that the District Court did not "revisit" its order on partial summary judgment, but instead issued a well-reasoned decision on a matter attendant thereto but not previously determined.

III. Whether Petitioner has presented compelling reasons to grant the Petition where the Ninth Circuit's Memorandum of Opinion correctly recognized the sufficiency of the District Court's Findings and Conclusions of Law and adequately stated its own decision.

CORPORATE DISCLOSURE

Defendant-Appellee CHICAGO TITLE INSURANCE COMPANY ("Chicago Title"), by and through its attorneys, Alston Hunt Floyd & Ing, makes the following corporate disclosure:

Chicago Title is a Missouri corporation. It is wholly owned by Chicago Title & Trust Company, Chicago Title & Trust Company is wholly owned by Fidelity National Financial, Inc. Fidelity National Financial, Inc. is a publicly-traded company whose symbol is "FNF" on the New York Stock Exchange.

LIST OF PARTIES

The parties below were Albert R. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under Agreement dated September 20, 1990, as amended, plaintiffs and appellants, and Chicago Title Insurance Company, defendant and appellee.

Albert R. Morgan, Jr. is now deceased. Petitioner, plaintiff-appellant in the court below, is Alice H. Morgan, Trustee of the Morgan Family Trust Under Agreement Dated September 20, 1990, As Amended ("Petitioner").

Respondent is Chicago Title Insurance Company, defendant-appellee in the court below ("Chicago Title").

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II. THE DISTRICT COURT APPLIED THE PROPER BURDEN OF PROOF CONSISTENT WITH ITS PRIOR RULINGS; THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF THE BURDEN OF PROOF	22

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III. THE NINTH CIRCUIT CORRECTLY RECOGNIZED THE SUFFICIENCY OF THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING PETITIONER'S CLAIM FOR A $295,877.20 JUDGMENT THAT "SHOULD HAVE" BEEN ENTERED, AND ADEQUATELY STATED ITS OWN DECISION 25

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APPENDIX

I. ORDER GRANTING IN PART AND DENYING IN PART (1) DEFENDANT DIMICELI'S MOTION TO ALTER OR AMEND JUDGMENT AND FOR OTHER RELIEF, FILED APRIL 25, 1996; (2) DEFENDANT DIMICELI'S MOTION FOR RELIEF, FILED NOVEMBER 27, 1996; AND (3) PLAINTIFFS' MOTION FOR ENTRY OF FINAL DEFICIENCY JUDGMENT, FILED DECEMBER 5, 1996 (FILED JUNE 26, 1998).... App. 1

II. ORDER (1) GRANTING PLAINTIFFS' MOTION FILED SEPTEMBER 29, 1995, FOR PARTIAL SUMMARY AND DEFAULT JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE, AND (2) DENYING DEFENDANT DIMICELI'S NON-HEARING MOTION, FILED OCTOBER 16, 1995, TO MODIFY AUGUST 26, 1994 ORDER (FILED DECEMBER 7, 1995) ... App. 6

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FEDERAL CASES:

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Malani v. Clapp, 56 Haw. 507, 542 P.2d 1265 (1975) 23

Montalvo v. Lapez, 77 Hawai'i 282, 884 P.2d 345 (1994) 23

Sentinel Insurance Co. v. First Insurance Company of Hawaii, 76 Hawai'i 277, 875 P.2d 894 (1994) 15, 18, 19

Sharp v. Hui Wahine, 49 Haw. 241, 413 P.2d 242 (1966) 23

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CONSTITUTION

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FEDERAL STATUTES:

28 U.S.C. § 1738 2

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Fed. R. Civ. P. Rule 52 ..... 3, 4, 18, 26

Fed. R. Civ. P. Rule 58 4

OPINIONS BELOW

The first Ninth Circuit decision in this action is set forth at 65 Fed. Appx. 184. No other matters in this action are reported.

The Ninth Circuit's Memorandum and Order is set forth in Petitioner's Appendix at pp. A-1 through A-5. Some of the District Court findings, conclusions and orders reviewed by the Ninth Circuit are in Petitioner's App. at pp. A-19 through A-25, A-26 through A-32, and A-33 through A-40.

Additional orders relevant to the Ninth Circuit's Memorandum of Opinion is set forth in the Appendix hereto at App. p. 1 and App. p. 6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, Rule 10, which provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 USC § 1738, which provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Article IV, Section 1 of the United States Constitution, which provides:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Rule 52(a) of the Federal Rules of Civil Procedure, which provides:

> **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to

> Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Rule 52(c) of the Federal Rules of Civil Procedure, which provides:

> **Judgment on Partial Findings.** If during a trial without jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to

render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

STATEMENT OF THE CASE[1]

In this action, Petitioner sought recovery of fees, costs and other damages allegedly incurred in a residential real estate foreclosure filed by Petitioner in the Fifth Circuit Court, State of Hawai'i ("State Court"), *Morgan v. Kerr,* Civil No. 93-0199 (1993) ("Foreclosure"). In 1991, Petitioner loaned $300,000 to Edgar Kerr ("Kerr") and took a mortgage on a residence at Princeville, Kauai, Hawai'i as security. Petitioner obtained a Loan Policy of Title Insurance ("Policy") from Chicago Title through its policy-issuing agent, First Hawaii Title Corporation ("FHTC"). Kerr defaulted and in 1993, Petitioner filed the Foreclosure against him and others, including Rosetta Ann Dimiceli ("Dimiceli"), the vendee/grantee under an Agreement of Sale and Satisfaction Deed, both from Kerr as vendor/grantor, for the mortgaged property. Both documents were recorded after the date of the mortgage and the Policy.

[1] In addition to the facts set forth herein, Chicago Title specifically disputes certain facts and issues raised below in its "Reasons for Denying the Writ" below.

After Petitioner's first motion for summary judgment in the Foreclosure was denied, Petitioner's counsel sent a letter dated April 20, 1994 to FHTC (the "Letter") advising of a possible claim against title.[2] FHTC filed the Letter after noting it was for "info. only" and did not forward it to Chicago Title. Chicago Title did not respond to the Letter in 1994, of course, because it did not possess a copy of the Letter.

Five years later, after the Foreclosure was completed and the appeal to the Hawai'i Supreme Court settled before a decision was issued, Petitioner's counsel, Steven Jacobson ("Jacobson"), sent Chicago Title a copy of the Letter requesting reconsideration of Petitioner's claim. After investigation, Chicago Title denied the claim. Petitioner filed this action on February 22, 2000, seeking to recover, among other things, attorneys' fees and costs incurred in prosecuting the Foreclosure plus the amount of a judgment against Dimiceli and the amount of a deficiency judgment against Kerr that Petitioner claims should

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[2] The Letter noted that Dimiceli was "claiming an interest in the property by reason of an Agreement of Sale entered into between her and Kerr on May 9, 1992, and recorded on July 28, 1992" and was entered into the District Court's record as Trial Exhibit No. 2. This was the Agreement of Sale mentioned in Petitioner's foreclosure complaint, and the very reason Dimiceli was made a party to the Foreclosure in the first place. On appeal (No. 02-16141), the Ninth Circuit determined that the Letter was sufficient notice under the Policy to trigger Chicago Title's duty to defend Petitioner against a possible covered claim.

also have been (but was not) entered against Dimiceli in the Foreclosure.

In the complaint, and contrary to her statement in the Petition, Petitioner did **not** specifically seek recovery of any alleged "judgment" against Kerr for $131,931.30 in attorneys' fees. Rather, Petitioner claimed more generally (1) breach of insurance contract (the Policy), and (2) bad faith, for which Petitioner sought punitive damages. Petitioner sought recovery of (a) attorneys' fees and costs incurred in the Foreclosure and losses attributable to an "unfavorable settlement" of the Foreclosure, and (b) $1,000,000.00 in punitive damages for Chicago Title's alleged bad faith. After Chicago Title was granted summary judgment on Petitioner's bad faith and punitive damage claims, the only issue for trial was the amount of damages to which Petitioner was entitled, *i.e.*, the amount of attorneys' fees reasonably and necessarily incurred in the Foreclosure for the defense of a claim covered under the Policy, and other compensatory damages.

At trial in May 2005, Petitioner called only one witness: an expert on the prevailing rates for commercial litigation (but not residential foreclosure) attorneys during the period of the Foreclosure. Petitioner's counsel herein was also her counsel in the Foreclosure, *i.e.*, Jacobson. Although listed as a potential witness and present at trial, Petitioner elected not to call Jacobson to testify about the work performed and the fees and costs incurred in the Foreclosure. Petitioner submitted stacks of pleadings

and attorneys' invoices for work allegedly incurred in the Foreclosure, but offered no testimony explaining (1) how the fees and costs shown in the invoices were incurred, and (2) if and how the fees related to the Foreclosure, generally, or the defense of a covered claim, specifically. Petitioner apparently expected the District Court and Chicago Title to sift through thousands of pages of invoices and Foreclosure filings to determine (1) which claimed charges related to what (if any) work in the Foreclosure, and (2) whether any work and charges related to defense of a covered claim and was reasonable and necessary.

In the Petition for Writ of Certiorari, Petitioner states that she sought recovery of the $131,931.30 attorney fee award against Edgar Kerr below, and that she is entitled to those fees based on the "collateral estoppel effect" of state court judgments. Contrary to Petitioner's contention, there is no specific "judgment" for attorneys' fees totaling $131,931.30. For this claim, Petitioner relies on the Deficiency Judgment against Kerr and others. *See* Petitioner's App. at pp. A-50 – A-51. As to Kerr, the Deficiency Judgment merely states, in relevant part:

> 1. Plaintiffs shall have and recover from Defendants Edgar D. Kerr ("Kerr"), Kauai Services, Inc., Dennis S. Nimkie and Greta L. Nimkie, jointly and severally, the principal amount of $295,877.20, plus interest of $113.49 per day and attorneys' fees of $28.37 per day from and after July 2, 1996 until the day this judgment is entered.

Further, Petitioner omits key facts from her contentions.[3]

First, Petitioner fails to note that the Deficiency Judgment (Petitioner's App. at pp. A-50 – A-51) upon which she relies for the $131,931.30 fees and costs claim is **not** against Dimiceli, but against only other defendants. *See* Petition at 6.

Second, Petitioner fails to explain that the other document upon which she relies (Petitioner's App. at pp. A-60 – A-61) is a motion she filed, not an order or judgment of the State Court. *See* Petition at 6.

Third, Petitioner fails to disclose that in the invoices submitted in evidence, Petitioner deleted many entries (including fees included in the $131,931.30 claim) because Petitioner recognized those fees did not pertain to defense of a covered claim, and were thus not recoverable against Chicago Title.

Fourth, Petitioner's statement of what she claimed in the District Court is not entirely accurate. While the Foreclosure pleadings in evidence include the State Court orders and judgments, Petitioner did not rely on the Deficiency Judgment for her fees and costs claim, except to the extent she sought recovery of the fees associated with its drafting for the State

[3] Respondent will address the merits of the collateral estoppel argument in its legal argument section, *infra*.

Court.[4] Indeed, Petitioner did not rely on this argument to the Ninth Circuit.[5] There, as in the District Court, she based her claim for fees and costs on counsel's invoices, the entire State Court record and the expert testimony. Significantly, in her Opening Brief to the Ninth Circuit Petitioner stated: "Morgan's request for an award of fees relating to the state court action does *not* seek all their fees incurred therein." (Opening Brief pp. 20, 38, emphasis in original.) She then went on to explain, for the first time, that she had been paid some of the fees awarded in the Foreclosure.

Despite Petitioner's implicit recognition that she was not entitled to reimbursement of all the fees and costs reflected in the evidence since they were not all incurred defending a covered claim, Petitioner failed to offer any testimony or other evidence showing which, if any, fees and costs reflected in the invoices were reasonable and necessarily incurred in the Foreclosure or in defense against covered claims. As a result, the District Court correctly determined that Petitioner did not meet her burden of proof to establish a *prima facie* showing that the attorneys' fees

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[4] Collateral estoppel is mentioned but once and the arguments consumes only two sentences in Petitioner's 35-page Trial Brief. (Petitioner's Trial Brief in the United States District Court, District of Hawai'i Civil No. 00-00145 BMK, page 21.)

[5] Petitioner merely mentioned that Chicago Title "cannot challenge the state court's determinations" in a footnote. Opening Brief p. 38, n.10.

and costs were incurred defending a covered claim and were reasonable and necessary. The District Court correctly entered judgment in favor of Petitioner for only nominal damages, $1.00.

Petitioner also neglects to disclose that the "$295,877.20 surrendered deficiency claim" was not against Dimiceli. While the Deficiency Judgment against Kerr was for that amount, the State Court correctly determined that Kerr's and Dimiceli's liability were not identical. There was no $295,877.20 judgment against Dimiceli "given up" by Petitioner. The $295,877.20 amount represents the amount Petitioner claims the state court **should have** entered against Dimiceli, not an actual judgment.[6] Petitioner is unhappy with certain rulings of the State Court, but she is not entitled to any issue preclusion based on non-existent judgments.

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[6] Petitioner contended below that the Order Granting in Part and Denying in Part (1) Defendant Dimiceli's Motion to Alter or Amend Judgment and for Other Relief, filed April 25, 1996; (2) Defendant Dimiceli's Motion for relief, filed November 27, 1996; and (3) Plaintiffs' Motion for Entry of Final Deficiency Judgment, filed December 5, 1996, filed June 26, 1998 (the "June 26, 1998 Order") were incorrect. The June 26, 1998 Order amended the Order (1) Granting Plaintiffs' motion filed September 29, 1995, for Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, and (2) Denying Defendant Dimiceli's Non-Hearing Motion, filed October 16, 1995, to Modify August 26, 1994 Order was filed on December 7, 1995 (the "December 7, 1995 Order"). App. p. 6.

The Ninth Circuit affirmed in part, reversed in part, and remanded certain issues for further consideration. Specifically, the Ninth Circuit:

- agreed Petitioner failed to prove the attorneys' fees and costs sought were related to the defense of the covered claims and were reasonable and necessary, as required by Hawai'i law,
- agreed Petitioner failed to prove "with reasonable certainty" the value of her surrender of a claim already dismissed by the State Court (*i.e.*, the claim against Dimiceli), and
- held the District Court's conclusions were not contrary to the District Court's prior order on summary judgment. The summary judgment ruling related only to the burden of proving allocability of defense costs between covered and non-covered claims; it did not absolve Petitioner from making the initial showing that the fees and costs were necessary and reasonable and related to defense of covered claims.

Petitioner's App. at pp. A-1 – A-5.

SUMMARY OF ARGUMENT

The Ninth Circuit followed the decisions of this Court and properly determined that the District

Court followed Hawai'i law regarding the burden of proof in insurance coverage disputes.

The Ninth Circuit correctly recognized that the District Court did not "revisit" its order on partial summary judgment, but instead issued a well-reasoned decision on a matter attendant thereto but not previously determined.

The District Court's findings of fact and conclusions of law properly set forth the basis for its ruling.

The Ninth Circuit's Memorandum of Decision filed April 6, 2007 adequately set forth the basis of its decision.

REASONS FOR DENYING THE WRIT

Review pursuant to a writ of certiorari is discretionary, not obligatory. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

A petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In considering petitions for certiorari, it is inappropriate to grant certiorari where there is no showing that a Circuit Court of Appeals decided an important question of local law in conflict with applicable local decisions. *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938). It is also inappropriate to grant certiorari

where a petitioner does not show a decision was probably in conflict with yet unannounced state law. *Id.* Issues of state law will not be considered on certiorari where a decision cannot reconcile any "conflict of circuits," or do more than enunciate a tentative rule to guide particular federal courts. *Id.*

Issues for consideration in petitions for writ of certiorari were well summarized in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1954):

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals.

Rice, 349 U.S. at 619-620. Petitioner raises no issue of public importance, merely her personal disagreement with and professed inability to understand the decisions below. As demonstrated herein, the District Court and Ninth Circuit decisions were consistently and appropriately adjudicated. None of the grounds for granting a writ of certiorari exist. Review of the Ninth Circuit's Memorandum of Decision by this Court is unwarranted, and the Petition for Writ of Certiorari should be denied.

I. THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF *SENTINEL*[7] AND FOLLOWED THIS COURT'S HOLDINGS ON THE PRECLUSIVE EFFECT OF STATE COURT DETERMINATIONS IN FEDERAL DIVERSITY ACTIONS

Petitioner obliquely argues that she was entitled to have the District Court apply the doctrine of collateral estoppel to prevent Chicago Title from disputing her claim for fees and costs. Petitioner is wrong. *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81, 102 S. Ct. 892, 896, 79 L.Ed.2d 56, 61 (1984) states "that a federal court must give to a state court **judgment** the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." (Emphasis added.)

Hawai'i recognizes both *res judicata, i.e.,* claim preclusion, and collateral estoppel, *i.e.,* issue preclusion. *Exotics Hawaii-Kona, Inc. v. E.I. Dupont DeNemours & Company,* 104 Hawai'i 358, 364, 90 P.2d 250, 256 (2004). Petitioner is obviously asserting issue preclusion which "applies to a subsequent suit between the same parties or their privies on a different cause of action." *Id.,* 104 Hawai'i at 257, 90 P.2d at 365. In doing so, Petitioner bore the burden of establishing that:

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[7] *Sentinel Insurance Co. v. First Insurance Company of Hawaii,* 76 Hawai'i 277, 875 P.2d 894 (1994).

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question;
>
> (2) there is a final judgment on the merits;
>
> (3) the issue decided in the prior adjudication was essential to the final judgment; and
>
> (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior adjudication.

Id., quoting *Bremer v. Weeks,* 104 Hawai'i 43, 54, 85 P.2d 150, 161 (2004). Here, Petitioner urges the application of non-mutual offensive issue preclusion. *Id.* In other words, she wishes to use rulings in the Foreclosure to bind Chicago Title and the courts below to the State Court determinations regarding the claim for fees and costs and the $295,877.20 Deficiency Judgment against Kerr. Petitioner is wrong because the necessary requirements for issue preclusion are not present.

As to the first requirement, the issues decided in the Foreclosure are not identical to those in question here. To the extent the Deficiency Judgment addressed fees and costs they were for the entire foreclosure against Kerr, including fees for claims and defenses that had nothing to do with defense of a covered claim. The $295,877.20 Deficiency Judgment against Kerr is not the same claim that Petitioner asserted against Dimiceli, the claim for which Petitioner seeks recovery from Chicago Title. The claim against Kerr was on the note and mortgage, while the claim against Dimiceli was on the Satisfaction Deed.

The State Court correctly determined that while Dimiceli took the property subject to the mortgage, she had not assumed the note and mortgage.

As to the second requirement, there was no final judgment against Dimiceli since the claims between her and Petitioner were voluntarily dismissed in the settlement.

As to the third element, it was not essential for the State Court to determine the fees and costs related to the defense of a covered claim asserted by Dimiceli in order to render an award for fees and costs arising out of the note and mortgage against Kerr. Nor was it necessary for the State Court to decide whether Dimiceli was liable to Petitioner under the Satisfaction Deed in order to determine Kerr's liability under the note and mortgage.

As to the fourth requirement, privity is a label that simply expresses a conclusion that preclusion is proper. *Flores v. Barretto,* 99 Hawai'i 270, 279, 54 P.3d 441, 450 (2002), citing *Bush v. Watson*, 81 Hawai'i 474, 480, 918 P.2d 1130, 1136, *reconsideration denied*, 81 Hawai'i 474, 918 P.2d 1130 (1996) (citation omitted). Under Hawai'i law it is within the trial judge's discretion to determine whether offensive preclusion would be unfair to a defendant not a party to the prior action. *Exotics Hawaii-Kona, Inc.,* 104 Hawai'i at 260-261, 90 P.2d at 368-369. Since the District Court decided that Petitioner had failed to prove her damages, it obviously determined that application of offensive issue preclusion would have been unfair to Chicago Title. Because the issue preclusion

theory was so minor, the District Court was not obligated to say more.[8]

The Ninth Circuit properly affirmed the District Court's determinations because the District Court gave the appropriate consideration to any preclusive effect of the Foreclosure rulings in rendering its decision. Petitioner, however, (1) misunderstands the preclusive effect of the State Court determinations, and (2) mischaracterizes the nature of the decisions made by the State Court.

First, Petitioner claims the State Court judgment regarding fees and costs against Kerr for the entire Foreclosure precluded Chicago Title from disputing Petitioner's claims for the fees and costs for defending against covered claims made by Dimiceli. Petitioner is wrong and *Sentinel, supra,* does not support Petitioner's conclusion. In *Sentinel,* the court adopted a case-by-case rule for determining whether an insurer was obligated to indemnify as a result of its breach of its duty to defend. *Sentinel,* 76 Hawai'i at 296, 875 P.2d at 913. The court specifically recognized that collateral estoppel effects in insurance cases should

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[8] Courts in the Ninth Circuit are guided by *Carr v. Yokohama Specie Bank, Ltd.,* 200 F.2d 251 (9th Cir. 1952) with respect to the sufficiency of findings under Fed. R. Civ. P. Rule 52. It is not necessary "that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention." *Carr v. Yokohama,* 200 F.2d at 255.

be limited. *Sentinel*, 76 Hawai'i at 295-296, 875 P.2d at 912-913.[9] *Sentinel* also recognized that in cases where an insurer consistently argues that there is no coverage, there is no estoppel because blanket application would provide the insured a windfall since it would receive a benefit for which it had not bargained. *Id.* "[E]quity requires that the consequences of an insurer's breach of its duty to defend must be considered on a case by case basis." *Id.*, 76 Hawai'i at 294-295, 875 P.2d at 911-912. Chicago Title has consistently argued that there was no coverage for Dimiceli's claims.

Here, the State Court did **not** make any determination, explicit or implicit, regarding the amount of fees and costs awarded against Kerr which could have been utilized in the District Court's analysis of the fees and costs for defense of covered claims asserted by Dimiceli. "The insurer is not bound . . . as to issues not necessarily adjudicated in the prior action and can still present any defense not inconsistent with the judgment." *Hogan v. Midland National Ins. Co.*, 3 Cal.3d 553, 564, 476 P.2d 825, 832 (1970).

The so-called $131,931.30 "award" for fees and costs related to the **entire** Foreclosure, not simply for

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[9] Estoppel may be appropriate "where the insured has been prejudiced in some way by the insurer's failure to provide a defense . . . or where the insurer has taken inconsistent positions with regard to defense and coverage." 76 Hawai'i at 296. The record demonstrates, however, that such circumstances were not present here, nor does Petitioner claim they were.

claims covered under the Policy. The fees and costs incurred by Petitioner to pursue a foreclosure remedy are not recoverable from Chicago Title since it was not the cause of those fees; Chicago Title did not default on the note and mortgage and cause Petitioner to incur fees to recover the debt by foreclosing against the property. In order to decide the unadjudicated issue of the fees and costs to defend against covered claims, the District Court needed evidence thereof from Petitioner, which, of course, was not provided at trial.

Second, Petitioner claims the District Court should have given preclusive effect to a judgment not entered against Dimiceli. While the State Court initially ruled that Dimiceli was liable for $277,203.35 pursuant to the Satisfaction Deed (Petitioner's App. at pp. A-47 – A-48), but not the $295,877.20 Deficiency Judgment against Kerr (Petitioner's App. at pp. A-41 – A-49) that Petitioner claims, it **reversed** its ruling regarding Dimiceli's liability, amended the earlier judgment and did not enter judgment against her for that claim (Petitioner's App. at pp. A-50 – A-52). And, Petitioner voluntarily dismissed all claims against Dimiceli, leaving no final judgment against her on any claim. Petitioner evidently expects issue preclusion be given to a claim/judgment no longer in existence because it "might" have been reversed on appeal. Petitioner is wrong. Without a judgment against Dimiceli for a deficiency which was covered under the Policy, there can be no preclusion and no determination that

Chicago Title is liable to Petitioner for that amount based on any theory. Petitioner's "wish" for a greater award does not mean Chicago Title is obligated to pay it.

Migra, supra, requires federal courts to give a state court **judgment** the same preclusive effect that the state court would give that judgment. *Id.*, 465 U.S. at 81. Here, under Hawai'i law the $131,931.30 award for fees and costs has no preclusive effect because it was not against Dimiceli. In addition, it did not make any determination as to which, if any, fees and costs related to the defense of covered claims, and determination of those issues was not essential to the Deficiency Judgment. Under Hawai'i law, the $295,877.20 Deficiency Judgment against Kerr has no preclusive effect because (a) it was not against Dimiceli, (b) the State Court determined she had no liability for that amount, and (c) all claims against Dimiceli were voluntarily dismissed.

Petitioner may not like the result, but the District Court and the Ninth Circuit complied with Hawai'i law and Federal authority requiring application of Hawai'i law.

II. THE DISTRICT COURT APPLIED THE PROPER BURDEN OF PROOF CONSISTENT WITH ITS PRIOR RULINGS; THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF THE BURDEN OF PROOF

Petitioner claims the Ninth Circuit chose not to rule on what Petitioner calls the District Court's "change of mind." Petitioner is wrong. The Ninth Circuit specifically found that the District Court did not change its mind and its ruling was consistent:

> **The district court's conclusion** that the Morgans failed to prove these damages **was not contrary to its prior order, which related only to the burden of proving allocability of defense costs.**

Petitioner's App. at p. A-3.

The Ninth Circuit's analysis was correct. In the October 14, 2004 Order Granting Summary Judgment (Petitioner's App. at pp. A-6 – A-15), the District Court found that in Chicago Title's motion for summary judgment it did not present evidence as to **allocability** apart from stating "which claims were covered and which were not." Petitioner's App. at p. A-14. The District Court specifically left open the opportunity for Chicago Title to present detailed evidence as to which fees were attributable to covered claims, and which were not: "If, at a later time, Defendant can carry its heavy burden and demonstrate allocability, the court will allocate expenses." *Id.*

The District Court did not determine that it was Chicago Title's burden to make a causal link between the fees and costs claimed and the defense of a covered claim – it would be nonsense to require the defending party to meet that burden because it would have no incentive to do so. It was not until the close of Petitioner's case – after Petitioner had failed to present evidence of a "causal link" – that the District Court was forced to make a difficult, but correct, decision on the legal effect of Petitioner's failure.

The Petition for Writ of Certiorari omits from the Writ many citations of applicable Hawai'i law which were followed by the District Court and Ninth Circuit. In Hawai'i, a plaintiff seeking to recover fees and costs as damages must establish that the fees and expenses were the natural and necessary consequences of the defendant's breach. *Montalvo v. Lapez,* 77 Hawai'i 282, 296, 884 P.2d 345, 359 (1994) (stating general rule that in order to recover damages, a plaintiff has the burden of proving that the damages were legally caused by defendant); *Uyemura v. Wick,* 57 Haw. 102, 109, 551 P.2d 171, 176 (1976) (legal fees incurred by plaintiff in litigation with third party awarded as damages); *Sharp v. Hui Wahine,* 49 Haw. 241, 413 P.2d 242 (1966) (self-serving opinions as to reasonableness of attorneys' fees held insufficient to meet the burden of proof).

Hawai'i law requires that the initial burden to show legal cause be met by plaintiff's introduction of admissible, competent evidence which furnishes a basis for the assessment of damages. *Malani v.*

Clapp, 56 Haw. 507, 517-518, 542 P.2d 1265, 1271-1272 (1975) (burden on plaintiff to provide competent evidence of damages). Here, Petitioner was required to demonstrate by competent evidence that (1) attorneys' fees and costs were incurred; and (2) they were incurred for matters which should have been paid by Chicago Title in defense of covered claims. Petitioner failed to make this basic causal connection.

Petitioner's citations to *Prisco v. A. A. Carting Corp.,* 168 F.3d 593, 607 (2nd Cir. 1999) and *White v. Godinez,* 301 F.3d 796, 803 (7th Cir. 2002) are off point. The District Court did not disregard an earlier ruling nor revisit without notice an issue "which ultimately turned on the sufficiency of a party's evidence" after Petitioner put on her case. As demonstrated herein, the District Court's rulings were completely consistent. Further, the Ninth Circuit specifically recognized the District Court's decisions were consistent.[10]

The District Court correctly – and consistently – ruled that it was Petitioner's burden to show that the damages claimed were causally related to Chicago Title's failure to defend a covered claim and not from

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[10] Both *Prisco* and *White* are factually distinct from this case as well. In *Prisco,* the Court determined that because the plaintiff was not prejudiced, the alleged "change in position" was irrelevant in any event. *Prisco,* 168 F.3d at 607. *White* actually concerned the specific issue of the standard for adequate representation in the defense of murder charges, circumstances much different than those here. *White,* 301 F.3d at 800.

other causes or sources, *e.g.*, the prosecution of the Foreclosure, affirmative claims for money damages or other, noncovered claims. *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 128, 839 P.2d 10, 17 (1992) (trial court abused its discretion in attorney fee award where it failed to offset damages before calculation). Likewise, the Ninth Circuit rightly affirmed the District Court's determination. Petitioner mischaracterizes the District Court's ruling as a "change," but Petitioner's position results from improperly blurring the line between (1) the cause of damage and (2) the reasonableness of the damage claim.

III. THE NINTH CIRCUIT CORRECTLY RECOGNIZED THE SUFFICIENCY OF THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING PETITIONER'S CLAIM FOR A $295,877.20 JUDGMENT THAT "SHOULD HAVE" BEEN ENTERED, AND ADEQUATELY STATED ITS OWN DECISION

Petitioner argues she "had no idea" what the purported deficiencies of proof were, but Petitioner need look no further than the Findings of Fact and Conclusions of Law and Order of Dismissal filed July 15, 2005 (Petitioner's App. at pp. A-19 – A-25), where the District Court properly found:

> Because Plaintiffs failed to (1) provide proof of the reasonableness and necessity of the work performed; (2) submit evidence of a

> connection between the work done and the covered claims; and (3) show entitlement to the other requested damages, Defendant's Motion to Dismiss [pursuant to Rule 52(c) of the Federal Rules of Civil Procedure] is GRANTED.

Petitioner's App. at pp. A-19 – A-20.

The District Court was not required to guess what evidence Petitioner might have had available but failed to offer. Nor was the District Court obligated to instruct counsel how to present his case.

The Ninth Circuit considered and rejected Petitioner's claim for the $295,877.20 Deficiency Judgment against Kerr, and stated "the Morgans failed to prove with 'reasonable certainty,' (citation omitted) the value of their surrender of a claim which had previously been dismissed by the state court." Appx. A-3. There is no authority requiring the Ninth Circuit to say more, and Petitioner fails to cite any.

Petitioner cites only to *Pacific Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1238 (10th Cir. 2005) for holding that proper judicial administration generally "favors" a remand to the District Court for initial examination, where an issue has been raised in but not ruled upon by a District Court. Here, however, the District Court obviously ruled on and articulated its reasons on the issues presented by Petitioner. Petitioner may not like the result, but the District Court's determinations were well founded, as properly acknowledged and affirmed by the Ninth Circuit.

Petitioner has demonstrated no compelling reason to grant the petition.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

(Trial Exhibit 146)
5th CIRCUIT COURT
STATE OF HAWAII
FILED
'98 JUN 26 P2:34
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT R. MORGAN, JR. and ALICE H. MORGAN, Trustees, of Morgan Family Revocable Living Trust under Agreement dated September 20, 1990, as amended, Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr; ROSETTA ANN DIMICELI, unmarried, aka ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHARDT KAUAI SERVICES, INC., a Hawaii corporation; DENNIS L. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (Doe No. 1); COUNTY OF KAUAI (Doe No. 2); and DOES 3-50, Defendants.

CIVIL NO. 93-0199 (Foreclosure)
Trial: Week of 2/12/96
Hon. George M. Masuoka

ORDER GRANTING IN PART AND DENYING IN PART (1) DEFENDANT DIMICELI'S MOTION TO ALTER OR AMEND JUDGMENT AND FOR OTHER RELIEF, FILED APRIL 25, 1996; (2) DEFENDANT DIMICELI'S MOTION FOR RELIEF, FILED NOVEMBER 27, 1996; AND (3) PLAINTIFFS' MOTION FOR ENTRY OF FINAL DEFICIENCY JUDGMENT, FILED DECEMBER 5, 1996

Defendant Dimiceli's Motion to Alter or Amend Judgment and for Other Relief, filed April 25, 1996, came on for hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on May 21, 1996. Steven B. Jacobson appeared for the Plaintiffs, Paul A. Schraff appeared for Defendant Dimiceli, and Joseph Kobayashi appeared as Commissioner.

Defendant Rosetta Ann Dimiceli's Motion for Relief, etc., filed November 27, 1996, and Plaintiffs' Motion for Entry of a Final Deficiency Judgment, etc., filed December 5, 1996, came on for hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on January 7, 1997. Steven B. Jacobson appeared for the Plaintiffs and Paul A. Schraff appeared for Defendant Rosetta Ann Dimiceli.

The Court, having considered said Motions, the memoranda, affidavits, and arguments of counsel, having reviewed the records and files, and having determined that good cause has been shown; therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs shall have and recover from Defendants Edgar D. Kerr, Jr., Kauai Services, Inc., Dennis S. Nimkie and Gretta L. Nimkie, jointly and severally, the principal amount of $295,877.20, plus interest of $113.49 per day and attorneys' fees of $28.37 per day from and after July 2, 1996, until the date judgment is entered on this Order. Post-judgment interest shall run on the judgment as provided by law.

2. Plaintiffs shall have and recover from Defendant Dimiceli, jointly and severally with the defendants named in paragraph 1 above, the amount of $30,096.64. Said sum shall be applied to the amount that the defendants named in paragraph 1 owe to the plaintiffs. $30,096.64 is equal to 14 and 9/30 monthly payments of $2,104.66. Defendants Dimiceli was ordered to deposit these monthly payments with the Court, commencing on July 28, 1994, pending further orders of this Court, pursuant to this Court's Order Denying Plaintiff's Motion to Strike, filed on August 26, 1994, as a substitute for the payments required of Defendant Dimiceli under that Satisfaction Deed by and between Edgar D. Kerr, Jr., as Grantor, and Dimiceli, as Grantee, and recorded November 12, 1992 at the Bureau of Conveyances for the State of Hawaii as Document No. 92-183386. The Nimkies occupied the subject property during the entire period of July 28, 1994 to December 7, 1995 and Dimiceli was entitled to collect rental proceeds of the subject property during that period. Two of these monthly payments were made on August 2 and September 12,

1994. Defendant Dimiceli was obligated to make these monthly payments until December 7, 1995, the date that the Order Granting Plaintiffs' Motion filed September 29, 1995, for Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, etc. was filed in this Court.

3. In all other respects, the motions are DENIED.

4. There is no just reason for delay and the Court hereby directs the entry of this Order as a final judgment pursuant to Rule 54(b), Hawaii Rules of Civil Procedure.

5. The Fifth Claim for Relief in Plaintiffs' First Amended Complaint remains pending.

DATED: Lihue, Hawaii, June 26, 1998.

/s/ George M. Masuoka
Judge of the above-entitled Court

(Trial Exhibit 96)
5th CIRCUIT COURT
STATE OF HAWAII
FILED
'95 DEC 7 A10:39
LORNA M.L. CHING
CLERK

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

ALBERT H. MORGAN, JR. and ALICE H. MORGAN, Trustees, of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 as amended, Plaintiffs,

vs.

EDGAR D. KERR, JR., husband of Gena Kerr, ROSETTA ANN DIMICELI, unmarried, also known as ROSETTA SCOTT, ROSETTA COBLE and ROSETTA EHRHARDT; KAUAI SERVICES, INC., a Hawaii corporation; DENNIS S. NIMKIE, an individual; GRETA L. NIMKIE, an individual; UNITED STATES OF AMERICA; PRINCEVILLE AT HANALEI COMMUNITY ASSOCIATION (DOE NO. 1); COUNTY OF KAUAI (DOE NO. 2); and DOES 3-50, Defendants.

CIVIL NO. 93-0199 (Foreclosure)
First Motion Heard: October 9, 1995
Time: 1:00 pm.
Judge: Hon. George M. Masuoka

NO TRIAL DATE SET

ORDER (1) GRANTING PLAINTIFFS' MOTION FILED SEPTEMBER 29, 1995, FOR PARTIAL SUMMARY AND DEFAULT JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE, AND (2) DENYING DEFENDANT DIMICELI'S NON-HEARING MOTION, FILED OCTOBER 16, 1995, TO MODIFY AUGUST 26, 1994 ORDER

Plaintiffs' Motion For Partial Summary and Default Judgment, Decree of Foreclosure and Order of Sale, filed in this action on September 29, 1995 ("First Motion"), came on for duly noticed hearing before the Honorable George M. Masuoka, Judge of the above-entitled Court, on October 9, 1995.

Steven B. Jacobson appeared before Plaintiffs Albert H. Morgan, Jr. and Alice H. Morgan, Trustees of the Morgan Family Revocable Living Trust under agreement dated September 20, 1990 as amended ("Plaintiffs"). Paul A. Schraff appeared for Defendant Rosetta Ann Dimiceli ("Dimiceli"). No other appearances were made.

Defendant Dimiceli's Motion to Modify August 26, 1994 Order, filed October 16, 1995 as a non-hearing motion ("Second Motion"), has also come on for consideration by the Honorable George M. Masuoka, Judge of the above-entitled Court.

Upon careful consideration of the moving, responding and supplemental papers, and the oral arguments of counsel as to the First Motion, there being no genuine issues of fact as to the relief sought in the First Motion and Plaintiffs being entitled to

such relief as a matter of law, the Court hereby GRANTS the First Motion, DENIES the Second Motion as moot in light of the granting of the First Motion, and FINDS, CONCLUDES, ORDERS, EXPRESSLY DETERMINES and EXPRESSLY DIRECTS as follows:

FINDINGS OF FACT

1. Plaintiffs have and hold, as mortgagees, a first mortgage lien upon the real property commonly known as 5095 Napo'okala Circle, Princeville, Kauai, Hawaii, legally described in Exhibit A hereto ("Property"), under a mortgage recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau of Conveyances") on January 10, 1992, as Document No. 92-003636 ("Mortgage").

2. At the time the Mortgage was recorded, Defendant Edgar D. Kerr, Jr. ("Kerr") owned and held record title to the Property. Defendant Kerr executed the Mortgage, as mortgagor, in favor of Plaintiffs.

3. The Mortgage was recorded to secure the performance of Defendant Kerr's obligations to Plaintiffs under a promissory note from Kerr to Plaintiffs dated December 30, 1991, in the principal amount of $300,000 ("Note").

4. $291,878.88 of the $300,000.00 loaned by Plaintiffs to Kerr was not paid to him, but rather used for the benefit of the Property. That amount was used to satisfy previous mortgage loans secured by

the Property ($267,770.98), or to pay unpaid real property taxes ($862.00), loan and escrow costs ($20,679.18), and prepaid interest ($2,566.74). The mortgage loans repaid with Plaintiffs' loan largely replaced earlier loans to which Defendant Dimiceli had agreed and consented, and/or which Dimiceli had helped Kerr to obtain.

5. On or about May 9, 1992, Defendants Kerr and Dimiceli entered into a written Agreement of Sale ("Agreement of Sale I") in which Kerr agreed to sell his interests in the Property to Dimiceli. In Agreement of Sale I, Kerr and Dimiceli expressly recognized the existence and prior recording of Plaintiffs' Mortgage by describing the real property Kerr was agreeing to sell and Dimiceli was agreeing to buy as being "subject to" Plaintiffs' Mortgage, and by expressly agreeing that Dimiceli's rights under Agreement of Sale I were "subject to" Plaintiffs' Mortgage, among other provisions. Agreement of Sale I was recorded in the Bureau of Conveyances on July 28, 1992 as Document No. 92-121191. The term of Agreement of Sale I modified and superseded any differing terms in any prior agreements between Kerr and Dimiceli.

6. On or about November 2, 1992, Defendant Dimiceli and Kerr entered into a Satisfaction Deed agreement modifying Agreement of Sale I. In the Satisfaction Deed agreement, Kerr agreed to transfer record title to the Property to Dimiceli, subject to Plaintiffs' Mortgage. Kerr agreed to do so, even though Dimiceli had not yet paid the principal and

other amounts she had agreed to pay to Kerr under Agreement of Sale I, in return for Dimiceli's promise to pay all such amounts to Plaintiffs instead, in partial satisfaction of the obligations to Plaintiffs secured by Plaintiffs' Mortgage.

7. The Satisfaction Deed agreement was recorded in the Bureau of Conveyances on November 12, 1992 as Document No. 92-182386. It transferred record title to the Property to Dimiceli, subject to the Mortgage. Dimiceli has owned and held record title to the Property since November 12, 1992, subject to the Mortgage.

8. On or about February 1, 1993, Defendants Dimiceli, Kauai Services, Inc. ("Kauai Services"), Dennis S. Nimkie and Greta L. Nimkie (the latter two, collectively, "Nimkies") entered into an unrecorded Agreement of Sale ("Agreement of Sale II") in which Dimiceli agreed to sell an undivided two-thirds interest in the Property to Kauai Services, and granted Kauai Services an option to purchase the remaining one-third interest, in return for Kauai Services' promise to cause repayment of the $300,000 principal balance of Plaintiffs' Mortgage. The provisions of Agreement of Sale II included a personal guaranty of Kauai Services' obligations thereunder by the Nimkies. Nimkies have occupied the Property since February 1993.

9. On March 15 and 16, 1993, the Administrator of the Small Business Administration ("SBA"), as mortgagee, recorded mortgages against the Property

in the Bureau of Conveyances as Document Nos. 95-040787 and 93-041675 ("SBA Mortgages"). The SBA Mortgages had been executed by Dimiceli as mortgagor.

10. On August 26, 1994, in this action, this Court ordered Dimiceli and the Nimkies to make monthly payments of $2,104.66 to the Clerk of the Court, from and after July 28, 1994, pending further Orders of the Court. $2,104.66 is the amount of the monthly payment Dimiceli originally agreed to make to Kerr under Agreement of Sale I, and thereafter agreed to make to Plaintiffs under the Satisfaction Deed agreement.

11. On November 14, 1994, Defendant Princeville at Hanalei Community Association (Doe No. 1) ("Association") recorded notice of a $654.66 lien against the Property in the Bureau of Conveyances, as Document No. 94-191850, for allegedly unpaid community association dues.

12. On March 15, 1995, Defendant County of Kauai (Doe NO. 2) recorded a $3,883.17 lien against the Property in the Bureau of Conveyances, as Document No. 95-041019, for unpaid real property taxes due and owing for the 1993-1994 and 1994-1995 property tax periods.

13. On May 24, 1995, Plaintiffs recorded a notice of the pendency of this action in the Bureau of Conveyances as Document No. 95-069240. No liens or encumbrances, other than those listed in Exhibit A or in the foregoing paragraphs, had been recorded

against the Property prior to the recording of the notice of pendency of action.

14. The obligations owed to Plaintiffs under the Note and Mortgage have been defaulted upon. Payments due thereunder have not been made, property insurance policies with loss payable clauses payable to Plaintiffs have not been procured, and the Property has become subject to liens because of non-payment of community association dues and property taxes.

15. Defendant Kerr now owes Plaintiffs the following amounts under the Note and Mortgage, plus attorneys' fees and other costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $115.09 ($300,000 x 14% x 1/365 days) from and after July 9, 1995:

Principal	$300,000.00
Interest through July 9, 1993	3,835.62
Late Fees	24,586.85
Interest From July 9, 1993 Through July 8, 1995	64,390.68
Preliminary Title Report	553.50
Insurance	2,776.00
Service Charge	1,035.00
TOTAL	$397,177.65

16. The obligations Defendant Dimiceli owes Plaintiffs under the Satisfaction Deed agreement have been defaulted upon, and had been defaulted upon prior to the entry of this Court's Order of August 26, 1994, and Dimiceli now owes Plaintiffs

the following amounts thereunder, plus attorneys' fees and costs of suit, the amounts of unpaid community association dues and property taxes, and interest at a daily rate of $66.60 per day ($221,000 x 11% ÷ 365 days) from and after July 28, 1995:

Interest Due Prior to July 28, 1994	$ 10,569.90
Principal Balance Due July 28, 1994	221,000.00
Interest Due July 28, 1994 through July 27, 1995	21,046.60
Late Fees	24,586.85
TOTAL	$277,203.35

17. The obligations of Defendant Dimiceli and Nimkies under this Court's Order of August 26, 1994, have been defaulted upon, in that Dimiceli and the Nimkies failed to make the $2,104.66 monthly payments due September 28, 1994, and have failed to make all monthly payments due after that date.

18. Defendant Kerr's default in responding to Plaintiffs' Complaint was entered on September 30, 1993. The defaults of Defendant Association and Kauai Services in responding to Plaintiffs' First Amended Complaint were entered on October 13, 1995. The defaults of the Defendant Nimkies in responding to Plaintiffs' First Amended Complaint were entered on November 16, 1995.

19. On April 3, 1995, this Court entered its Order Granting Defendant United States of America's

Motion For Partial Summary Judgment in this action, establishing various matters.

CONCLUSION OF LAW

1. Plaintiffs' Mortgage constitutes a valid priority lien on the Property, binding upon and prior to the interests of all of the Defendants herein, save and except liens of Defendant County of Kauai for unpaid real property taxes, and subject only to certain prior reservations, declarations, restrictions, covenants, conditions and rights of entry described in Exhibit A.

2. Plaintiffs are third-party creditor beneficiaries of Dimiceli's promise, in the Satisfaction Deed agreement, to pay them the amounts she had previously agreed to pay to Kerr in Agreement of Sale I, in order to partially satisfy Kerr's obligations to Plaintiffs, and in return for Kerr's intermediate transfer of record title to her.

3. If Agreement of Sale II is still in effect, Plaintiffs are third-party creditor beneficiaries of Kauai Services' and Nimkies' promises, in Agreement of Sale II, to cause the payment of the $300,000 principal amount of the Mortgage.

4. To the extent the $300,000.00 they loaned to Kerr was used for the benefit of the Property, Plaintiffs are entitled to the imposition of an equitable mortgage or lien upon the Property, effective as of January 10, 1992, securing its repayment and the

payment of interest thereon and fees and costs incurred in collection.

5. The lien of Plaintiffs' Mortgage (or equitable mortgage or lien) secures the performance of all obligations owed to Plaintiffs under the Note and Mortgage (or equitable mortgage or lien), including, but not limited to, those obligations which Defendant Dimiceli promised and agreed to partially satisfy, in the Satisfaction Deed agreement, in return for an immediate transfer of record title to the Property to her.

6. Given the terms to which Defendant Dimiceli agreed in Agreement of Sale I, the Satisfaction Deed agreement and Agreement of Sale II, Dimiceli cannot prevail on her defense that she and Kerr allegedly entered into an unrecorded DROA Agreement in March 1989, that the terms of the alleged unrecorded agreement prohibited Kerr from further mortgaging the Property without Dimiceli's consent, that Plaintiffs were subject to that provision because they allegedly were aware of Dimiceli's claim to equitable ownership of the Property under the unrecorded DROA Agreement, that Dimiceli did not consent in advance to the Mortgage, and that she can avoid the Mortgage for lack of such advance consent.

7. In any event, Plaintiffs were not on notice of any claim of Dimiceli to equitable ownership of the Property, under an unrecorded 1989 DROA Agreement or otherwise.

8. The obligations owed to Plaintiffs and secured by the Mortgage (or equitable mortgage or lien) have been defaulted upon. As a result, Plaintiffs are entitled to foreclose the Mortgage, to have the property sold in the manner provided by law subject only to the prior liens and encumbrances described above in paragraph 1 of these Conclusions, and to obtain monetary judgments against Defendants Kerr and Dimiceli, and perhaps Defendants Kauai Services and Nimkies (if Agreement of Sale II is still in effect), for any deficiencies remaining after the closing of the sale.

9. Defendant Kerr now owes Plaintiffs the following amounts under the Note and Mortgage, plus attorneys' fees and other costs of suit, the amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $115.09 ($300,000 x 14% x 1/365 days) from and after July 9, 1995:

Principal	$300,000.00
Interest through July 9, 1993	3,835.62
Late Fees	24,586.85
Interest From July 9, 1993 Through July 8, 1995	64,390.68
Preliminary Title Report	553.50
Insurance	2,776.00
Service Charge	1,035.00
TOTAL	$397,177.65

10. Defendant Dimiceli now owes Plaintiffs the following amounts under the Satisfaction Deed agreement, plus attorneys' fees and costs of suit, the

amounts of all unpaid community association dues and property taxes, and interest at a daily rate of $66.60 per day ($221,000 x 11% ÷ 365 days) from and after July 28, 1995:

Interest Due Prior to July 28, 1994	$ 10,569.90
Principal Balance Due July 28, 1994	221,000.00
Interest Due July 28, 1994 through July 27, 1995	21,046.60
Late Fees	24,586.85
TOTAL	$277,202.00

11. The amounts deposited by Dimiceli and/or Nimkies with the Clerk of the Court, and now held by Clerk of the Court, should be paid to the County of Kauai as soon as possible, to be credited against the outstanding real property taxes owed on the Property.

EXPRESS DETERMINATIONS AND EXPRESS DIRECTIONS

1. There is no just reason for delay in the entry of a final judgment, including a final decree of foreclosure and a final order of sale, as to all matters resolved (a) in this Order and (b) in this Court's Order filed April 3, 1995, granting Defendant United States of America's Motion For Partial Summary Judgment.

2. Final judgment shall therefore be entered as to all such matters pursuant to H.R.C.P. Rule 54(b).

DATED: Lihue, Hawaii, Dec. 7, 1995.

/s/ George M. Masuoka
Judge of the above-entitled Court

EXHIBIT "A"
(MORTGAGED PROPERTY)

All of that certain parcel of land situate at Hanalei, Halelea, County of Kauai, State of Hawaii, described as follows:

Lot 22, area 15,458 square feet, more or less, as delineated on the map entitled "PRINCEVILLE AT HANALEI", which said map was filed in the Bureau of Conveyances of the State of Hawaii as File Plan No. 1557.

TOGETHER WITH nonexclusive appurtenant easement for road purposes, over, across, along and upon the roadway lots shown on File Plan Nos. 1179, 1181 and 1557; provided, however, that in the event said lots or any portion thereof is conveyed to the State of Hawaii, County of Kauai or to any other governmental authority, said easement as to the lot or lots so conveyed shall immediately terminate.

TOGETHER ALSO WITH nonexclusive appurtenant easement to use for recreational purposes Lot 27, area 42,221 square feet, as shown on said File Plan No. 1557, subject to and with the benefit of the Declaration of Restrictions, Covenants and Conditions dated May 25, 1978, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 12921

Page 620 and all rules and regulations now or hereafter made by the Sunset Drive Community Association.

SUBJECT, HOWEVER, to the following:

1. DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS

Dated:	March 1, 1971
Recorded:	March 12, 1971
Book:	7444
Page:	93

to which reference is hereby made. (as amended)

DECLARATION OF DECLARANT

Dated:	May 10, 1985
Recorded:	May 21, 1985
Book:	18662
Page:	485

to which references is hereby made.

Notice of Transfer and Assignment dated May 1, 1990, recorded on August 7, 1990 in the Bureau of Conveyances of the State of Hawaii as Document No. 90-120777.

2. DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS OF SUNSET DRIVE SUBDIVISION

Dated:	May 25, 1978
Recorded:	May 30, 1978
Book:	12921
Page:	620
	to which reference is hereby made.

3. RIGHT-OF-ENTRY

In Favor Of: CITIZENS UTILITIES COMPANY

Dated:	July 6, 1979
Recorded:	August 28, 1979
Book:	13944
Page:	390
Purposes:	Granting a right-of-entry for utilities purposes.

4. Waiver and Release dated March 18, 1990, recorded on May 9, 1990 in the Bureau of Conveyances of the State of Hawaii in Book 23160 Page 690.

FILED
NOV 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-445

In the

Supreme Court of the United States

ALICE H. MORGAN, Trustee of the Morgan Family Trust Under Agreement Dated September 20, 1990, As Amended,
Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

STEVEN B. JACOBSON
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(808)-377-1814
Attorney for Petitioner

PETITIONER'S REPLY BRIEF

Petitioner Alice H. Morgan, Trustee of the Morgan Family Trust Under Agreement dated September 20, 1990, as amended, replies as follows to the Brief for Respondent In Opposition, largely to correct some of the unsupported factual inaccuracies therein:

1. Contrary to the Brief in Opposition (at 9-10 & n.5), Mrs. Morgan of course argued in the Court of Appeals that collateral estoppel establishes the existence and reasonableness[1] of at least $131,390.00 of her state court fees.

At page 35 of *the text* of her opening brief, she quoted the *Sentinel* rule, *i.e.*, Hawaii's special collateral estoppel rule for situations where an insurance carrier has breached its duty to defend. She then argued, at page 49 of *the text* of that brief, citing *Sentinel*, that "Morgans proved that the state court awarded them $131,931.30 of their fees incurred in the state action," "irrefutably" proving them.

2. Contrary to the Brief in Opposition (at 9-10 & n. 4), that same collateral estoppel argument had of course been made in the District Court first. It had been set out, *inter alia*, in Morgans' proposed findings of fact (Excerpts of Record On Appeal, at

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[1] The questions of the existence and reasonableness of Morgans' state court fees are different from the question of allocation. The Brief in Opposition confusingly mixes the two (e.g., at 18-19). The state court's adjudication establishes existence and reasonableness of Morgans' fees, not non-allocability.

868-869), and in their proposed conclusions of law (id., at 992).

3. Contrary to the Brief in Opposition (at 8, 19), the state court's determination that the Morgans incurred reasonable attorneys' fees totaling at least $131,931.30 in the state court action is actually and impliedly shown in paragraph 2 of its judgment of June 26, 1998, set forth at A-51. Said judgment awards the Morgans $295,877.20 plus "attorneys' fees of $28.37 per day from and after July 2, 1996 until [June 26, 1998]." The $295,877.20 figure includes $111,306.31 of attorneys' fees, as shown at A-60-61. $28.37 per day x 727 days equals $20,624.99. $111,306.31 plus $20,624.99 equals $131,931.30.

4. This is not a case where a Court of Appeals merely "misapplied a properly stated" decision of this Court. The Court of Appeals failed to "state" whether it was attempting to apply a federal collateral estoppel rule, or whether it was attempting to apply a state collateral estoppel rule – let alone what that rule was. It said nothing.

This Court should therefore grant certiorari and remand to the lower courts, with instructions to apply the appropriate *state* law rule as *Migra* requires.

Sentinel establishes a special Hawaii collateral estoppel rule for instances where, as here, an insurance carrier has breached its duty to defend – without requirements of privity, etc. The only requirement of *Sentinel* is that a "material factual finding" was "actually or impliedly adjudicated." The reasonableness of $131,961.30 of the Morgans'

state court fees was actually and impliedly "adjudicated," as reflected in a state court judgment. Nothing more is needed.

5. Contrary to the Brief in Opposition (at 22), the District Court quite clearly changed its mind, and shifted the burden of proof *as to whether the fees the Morgans incurred in the state court action were attributable to covered claims*, after the Morgans rested their case-in-chief.

The language quoted in the Brief in Opposition (at 22) says exactly that. As the Court of Appeals stated, the District Court's "prior order ...related ... to the burden of proving allocability of defense costs." A-3, A-12 to A-14.

Notwithstanding Chicago Title's disclaimer (at 23), the District Court very clearly held, before changing its mind, that it would apply California law imposing upon Chicago Title the "heavy burden" of proving that fee and cost items the Morgans incurred in the state court action were *not* attributable to matters covered by their Chicago Title policy. A-12 to A-14.

6. Contrary to the Brief in Opposition (at 11), Mrs. Morgan has made it very clear that she is additionally seeking the value of a surrendered-in-settlement *claim* for a $295,877.20 deficiency against Dimiceli, asserting that the District Court should have decided that *claim* by conducting an appeal-within-a-trial, reviewing the appropriate parts of the state court record using a "reasonable appellate court" standard, and then rendering findings and conclusions – to which the appellate courts and parties could appropriately respond –

reflecting such a review. Petition, at i, ii, v, 8 n. 1, 10, 11, 13, 14, 19-20.

7. Contrary to the Brief in Opposition (at 25-26), the District Court's only finding or conclusion as to the deficiency claim is at A-24 (not A-20).

There the District Court, ignoring and overlooking the entire state court record and other submitted evidence, erroneously found that the Morgans were "not entitled to damages for the remaining claims for consequential damages" because they had purportedly failed to "provide at trial *any proof* of an entitlement to damages on those specific claims."

8. The fact that the Morgans submitted 100 pages of proposed findings of fact (Excerpts of Record on Appeal, at 784-883) and 123 pages of proposed conclusions of law (id., at 884-1006) to the District Court refutes the Brief in Opposition's contention (at 7-8) that the Morgans merely dumped thousands of pages of documents on the District Court without any guidance as to what those documents said or showed.

CONCLUSION

The requested writ of certiorari should be granted for each and all of the foregoing reasons.

Respectfully submitted,

STEVEN B. JACOBSON
Counsel of Record
Attorney for Petitioner